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NOTE.

In the case of *Pomphrey* v. *Southwark Press*, reported [1901] 1 K. B. 86, and relating to the compensation to be paid to a workman under the Workmen's Compensation Act, 1897, Schedule 1 (2), the words "The maximum that can be awarded is one-half the difference so ascertained," which occur on page 91, line 11, in the judgment of Collins L.J., should be struck out.

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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

1901.

[IN THE COURT OF APPEAL.]

C. A.
1901
March 8.

SADGROVE *v.* HOLE.

Libel—Privileged Communication—Publication—Post-card—Evidence of Malice.

The defendant sent a post-card through the post on an occasion which, as between the defendant and the person to whom the post-card was sent, was privileged. The statements contained in the post-card had reference to the plaintiff, and would, if connected with him, have been defamatory of him, but the post-card did not disclose the name of the plaintiff or contain any indication that the statements in it referred to him, and no evidence was produced to shew that those statements were understood to refer to the plaintiff by any person through whose hands the post-card passed except the person to whom the post-card was sent:—

Held, that the plaintiff had failed to shew publication of a libel on him other than on a privileged occasion, and that, though the mere fact that

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a communication had been sent by post-card instead of by a closed letter would generally be evidence of malice, in the present case, inasmuch as the communication would not be understood by the persons through whose hands it passed as referring to the plaintiff, there was no evidence of express malice to avoid the privilege.

APPLICATION for a new trial or that judgment should be entered for the defendant on appeal from a judgment of Ridley J. at the trial of the action with a jury.

It appeared that the defendant, as managing director of a limited company, employed an architect on behalf of the company to prepare plans and drawings relative to a proposed addition to the company's premises. The architect was directed to employ a quantity surveyor to make out a bill of quantities, and he instructed the plaintiff to do this. The bill of quantities was accordingly prepared by the plaintiff, and copies were sent to seven builders whose names had been supplied by the defendant, and to whom invitations to tender for the work had been given. The contents of the bill of quantities came to the knowledge of the defendant, who appears to have thought that the amount of work indicated therein was much in excess of that which the company desired should be done. The defendant thereupon wrote and sent by post to one of the seven builders a post-card which was as follows: "The quantities sent you this morning by architect are entirely wrong. I have plans, &c., here, and you can give me prices on these.—Yours, &c., S. Hole." The defendant also wrote and sent by post to another of the seven builders a post-card which was as follows: "There are great errors in the quantities posted to you this morning. If you will call here you can see plans and give me price on these.—Yours obediently, S. Hole."

The plaintiff brought an action for libel on these two post-cards, alleging that they were defamatory of him in his calling of quantity surveyor. The defence was a denial that the words were published concerning the plaintiff, that they bore the interpretation placed upon them in the statement of claim, and that they amounted to defamatory matter. The defendant also pleaded that the publication to the builders was privileged and made bonâ fide and without malice. To this the plaintiff

replied alleging express malice, and that the contents of the post-cards were necessarily communicated and published to the postmen and clerks through whose hands they respectively passed before reaching the persons to whom they were addressed.

No one through whose hands either of the post-cards had passed was called as a witness at the trial.

The learned judge held that the words were capable of a defamatory meaning; that the occasion was not privileged; and he left the case to the jury, who returned a verdict for the plaintiff for 5*l.*, and judgment was entered for that amount.

The defendant appealed.

Firminger, for the defendant. The occasion as between the defendant and the builders was privileged, for there was a common interest that the bill of quantities on which the tenders were to be made should be correct. No doubt there was publication to the builders, but so far as any one else is concerned the post-cards contained bare statements of fact, without any person being named as responsible for the alleged errors. They would be quite unintelligible to any one but the builders, so that there is no evidence of publication before they reached the builders' hands. The sending of a post-card which conveys no meaning to the persons through whose hands it passes is not evidence of express malice.

Kemp, *K.C.*, and *J. C. Earle*, for the plaintiff. After the verdict of the jury the post-cards must be taken to have referred to the plaintiff. The clerks in the offices of the builders would know to whom the post-cards referred. It is no answer to this action to say that the post-cards would not have been understood, by the majority of the persons through whose hands they passed, to refer to the plaintiff. Brett L.J., in *Williamson* v. *Freer* (1), pointed out that a libel sent by telegraph is necessarily communicated to all the post-office clerks through whose hands it passes, and added that it was like the case of a libel contained on the back of a post-card. The decision in that case was that transmission unnecessarily by a post-office telegram of libellous matter, which would have been

(1) (1874) L. R. 9 C. P. 393.

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privileged if sent in a sealed letter, avoids the privilege. It is also pointed out in that case that the sending messages by telegraph when they might have been sent by letter was evidence of malice. This decision was followed in *Robinson* v. *Jones* (1), where Palles C.B. considered the case of a post-card stronger than that of a telegram because of the impossibility of imagining a case in which there could be any necessity to substitute a post-card for a closed letter. These decisions are direct authorities in the present case.

A. L. SMITH M.R. This is an application by the defendant for a new trial or that judgment should be entered for him in an action for libel in which there has been a verdict and judgment for the plaintiff.

The defendant was managing director of a company, and some building was about to be done by way of extending the business premises. He wrote, to two of the builders who had been asked to tender for the work, post-cards which are alleged to be libellous. The question whether the post-cards were libellous was left to the jury, and they decided in the affirmative. I cannot say that the writing was not capable of a defamatory meaning, or that the judge could have withdrawn the case from the jury. That, however, does not settle the matter, for in the course of the case the point was raised that the occasion was privileged, because the post-card, to take one of them only, was written by a building owner to a builder who was about to tender for building work, and it was the duty and interest of the former to point out to the builder that the materials on which he was to tender were incorrect. It seems to me that such an occasion must be privileged.

It is said, however, that the communication was sent in writing on a post-card, and that sending it in such a way avoids the privilege. The plaintiff to succeed in the action must prove a publication of and concerning him of libellous matter, and if he does not satisfy the onus of proof which is on him in this respect there is no cause of action. It is certainly my opinion that if a man writes a libel on the back of a post-

(1) (1879) 4 L. R. Ir. 391.

card and then sends it through the post there is evidence of publication, as in the case of a telegram. The cases cited shew that the two stand on the same footing. What, then, did the plaintiff prove? He proved the sending of a post-card; but, on the evidence, it is clear that he did not prove any publication of a libel on him until the post-card got into the hands of the builder, because then for the first time could any knowledge arise as to the person to whom the post-card referred. I quite agree that if the name of the plaintiff had appeared on the post-card there would have been plenty of evidence of publication to persons other than the builder. That, however, was not the case, and the plaintiff did not prove publication to any one before the post-card got into the builder's hands, and as a communication to him it was privileged unless there was evidence of express malice. I am further of opinion that there was no evidence of express malice to avoid the privilege. It is said that the mere writing on a post-card and sending it by post instead of sending a closed letter was evidence of malice, and I agree that if the name of the plaintiff had appeared on the card that would have been so; but in this case there was nothing to connect the libel with the plaintiff and no evidence of malice. I come to the conclusion, therefore, that the appeal must be allowed and judgment entered for the defendant.

COLLINS L.J. I am of the same opinion. In order to successfully maintain this action the plaintiff must prove that a libel was published of him. If it is shewn that the libel was published on a privileged occasion, he cannot succeed without proving express malice on the part of the defendant. On the occasion on which this post-card was written the defendant had a right to communicate the facts connected with the proposed building to the builder who was to make a tender, and the privilege would cover the communication of those facts unless there was a publication to others than the builder. Though the occasion would be privileged as between the writer and the person to whom the communication was addressed, the writer would not be justified in enlarging the area of publication, and therefore I think that if this statement on the post-card had been intelligible to others than to the person

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Collins L.J.

to whom it was addressed—as, for instance, if the name of the plaintiff had appeared in it—privilege could not be claimed. The peculiarity of this case is that the writing on the post-card is not on the face of it a publication of anything about the plaintiff. The case is analogous to the one that was put during the argument—of publication of a libellous statement as to some one whose name is expressed by a cipher intelligible only to the person addressed. In the present case there was no evidence that persons other than the defendant understood to whom the post-card referred. The plaintiff, therefore, failed to shew that, if there was publication of a libel, it was in reference to him. The learned judge ruled that there was no privilege, but I cannot agree with him. If the occasion as between the defendant and the builder was privileged, there being no evidence of publication to other persons and no implication of law of such a publication, the only question that remains is whether there was evidence of express malice. Unless the mere fact that the communication was on a post-card sent through the post is in itself sufficient to shew malice, I can see no evidence. Undoubtedly, sending a libellous communication by post-card may be evidence of malice, as pointed out by Brett J. in *Williamson* v. *Freer* (1), if the communication refers and would be taken to refer to a particular individual. I fail, however, to see any evidence of malice arising from the fact that the defendant disclosed to the public that which conveyed no meaning to the public. The gist of evidence of malice is that, knowing the communication will be understood by the public, the person who publishes it takes means which must bring it under the notice of the public. I think, therefore, there was no evidence of express malice, and that this point also fails the plaintiff, and that judgment should be entered for the defendant.

ROMER L.J. I agree.

Appeal allowed.

Solicitors for plaintiff: *Woodbridge & Sons.*
Solicitor for defendant: *Joseph E. S. King.*

(1) L. R. 9 C. P. 393.

A. M.

SKENE *v.* COOK.

1901
March 22.

Limitations, Statute of—Lapse of Time—Land Tax—Redemption—Interest, Recovery of—42 Geo. 3, *c.* 116, *s.* 123—3 *& 4 Will.* 4, *c.* 27, *s.* 1—*Real Property Limitation Act*, 1874 (37 *& 38 Vict. c.* 57), *ss.* 1, 8.

The yearly sum payable, under s. 123 of 42 Geo. 3, c. 116, by way of interest on the sum paid as a consideration for the redemption of land tax, is "rent" within the meaning of s. 1 of the Real Property Limitation Act, 1874; so that an action to recover the same is barred unless it is brought within the times limited by s. 1 in respect of actions to recover any land or rent.

APPEAL from the Westminster County Court.

The claim in the action was for the sum of 9*l.*, being one year's land tax payable by the defendant to the plaintiff on or before January 1, 1900, charged upon two houses in High Street, St. Giles, in the county of Middlesex, and to which sum the plaintiff claimed to be entitled as assignee of the benefit arising under the certificate of the contract for the redemption of the land tax dated February 19, 1874.

The defendant gave notice of the special defence that the plaintiff's claim was barred by a Statute of Limitations.

The following facts were admitted:—

In 1873 the owner in fee of the two houses in question—61 and 61A, High Street, St. Giles—granted to Purkis a lease of those houses for a term of forty-two years, and the lease contained a covenant by the lessee to pay all land tax charged upon the property during the term. Purkis was also lessee for years of No. 62, High Street, the three houses being then occupied together as a public-house.

In 1874 Purkis redeemed the land tax on all the property under the powers given by 42 Geo. 3, c. 116, and in 1879 he handed the certificate of the contract of redemption to the plaintiff with the intention of transferring the benefit thereof to him. A formal assignment of the benefit of the contract has since been made by Purkis to the plaintiff.

By various mesne assignments the lease of 61 and 61A

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became, in 1885, vested in the defendant, who by mistake paid the land tax to the Commissioners thenceforth until the year 1900. The plaintiff on receiving the certificate of redemption in 1879 put it away with his title-deeds, and forgot all about it until the year 1900.

The lease of No. 62 is now vested in the plaintiff.

The annual payment for which the land tax on 61 and 61A was redeemed amounted to 9*l.*, and the action was brought to recover one such annual payment due on January 1, 1900.

The county court judge gave judgment for the defendant on the ground that the claim was barred by lapse of time.

The plaintiff appealed.

Martelli, for the appellant. The decision of the county court judge was wrong. There is no Statute of Limitations to bar this action. The yearly sum sued for was created under s. 123 of 42 Geo. 3, c. 116. (1) The statute makes both the principal and the yearly sum a charge upon the land, and the nature of that charge was discussed in *Cousins* v. *Harris* (2), where Patteson J. points out (3) that it is in the nature of a mortgage, but there is no provision for compelling the mortgagor to pay off the principal debt, although the mortgagee

(1) By 42 Geo. 3, c. 116, s. 123, "Where any person or persons having any estate or interest (other than an estate of inheritance) in any manors, messuages, lands, tenements, or hereditaments, shall redeem the land tax charged thereon by or out of his, her, or their own absolute property, such manors, messuages, lands, tenements, or hereditaments shall be and become chargeable for the benefit of such person or persons, his, her, or their executors, administrators, or assigns . . . . with the amount of the moneys paid as the consideration for the redemption of such land tax . . . . and with the payment of a yearly sum or sums of money by way of interest thereon, equal in amount to the land tax redeemed.' Sect. 125: "In all cases where any . . . . person or persons redeeming any land tax shall by virtue of this Act be entitled to have and receive out of any manors, messuages, lands, tenements, or hereditaments, any yearly sums of money by way of interest, or by way of rent or rent-charge, equal in amount to the land tax redeemed, such yearly sum shall be payable on the same days as such land tax was payable at the time of the redemption thereof, ... and shall be recoverable by action, suit, distress, or any other means whereby rents reserved on leases are recoverable by law."

(2) (1848) 12 Q. B. 726.

(3) 12 Q. B. at p. 733.

may be compelled to receive it at any time. It is clear that the owner in fee cannot sue the tenant in possession for the principal debt. Sect. 1 of the Real Property Limitation Act, 1874 (1) does not bar the action because the yearly sum payable by way of interest is not "rent" within the meaning of that section, which is substituted for s. 2 of 3 & 4 Will. 4, c. 27, twelve years, instead of twenty, being the period of limitation. The word "rent" as used in those enactments has been held not to include ordinary rent-service, but to apply only

(1) 37 & 38 Vict. c. 57, s. 1: "After the commencement of this Act no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same."

Sect. 8: "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

Sects. 1 and 8 of the Real Property Limitation Act, 1874, are substantially in the same terms as ss. 2 and 40 respectively of 3 & 4 Will. 4, c. 27, except that twelve years have been substituted for twenty as the period of limitation. By s. 9 of the later Act all the provisions of 3 & 4 Will. 4, c. 27, shall remain in force, and be construed together with this Act, except certain sections, including ss. 2 and 40, which are repealed.

By s. 1 of the 3 & 4 Will. 4, c. 27 (which section is not repealed by the Act of 1874), "the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows: . . . . the word 'rent' shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land."

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to rents which are inheritances: *Grant* v. *Ellis*. (1) It may be admitted that if the yearly sum were a rent-charge s. 1 would apply. It applies to real actions only; it does not apply to the interest on a mortgage. Nor does s. 8 of the Act of 1874 (2) apply here. The purview of that section is to bar the right to bring actions for the recovery of debts charged upon land. The words are "no action shall be brought," and the section obviously is applicable only where a right of action exists. No action to recover the principal sum charged could ever have been brought in the present case. There is no "present right to receive" the principal sum. Sect. 8 does not bar any right to the principal sum charged; it only bars the remedy by action. If the right to recover the principal sum has been lost by lapse of time, then, treating the yearly sum payable by way of interest as in the nature of interest on a mortgage, the right to recover interest has also gone. *Hornsey Local Board* v. *Monarch Investment Building Society* (3) is distinguishable because a right of action was given in that case, whereas a person who redeems land tax has no right of action in respect of the principal sum which he has paid. [He referred also to *Neame* v. *Moorsom*. (4)]

Duka, for the respondent. The Real Property Limitation Act, 1874, bars this action, no payment of interest having been made for more than twelve years. The yearly sum payable by way of interest is "a periodical sum charged upon and payable out of land" within s. 1 of 3 & 4 Will. 4, c. 27. It is, therefore, "rent," and the limitation enacted by s. 1 of the Act of 1874 applies to it. It is a yearly sum payable out of land which can be redeemed by payment of a lump sum certain by a certain class of persons. It is practically a rent-charge, analogous to a tithe rent-charge, which is clearly within the statute: *Jones* v. *Withers*. (5) It also comes within s. 8 of the Act of 1874, the principal sum being a sum of money, bearing interest, charged upon or payable out of land, analogous to a mortgage debt and interest. There is a "present right to

(1) (1841) 9 M. & W. 113.
(2) Ante, note (1), p. 9.
(3) (1889) 24 Q. B. D. 1.
(4) (1866) L. R. 3 Eq. 91.
(5) (1896) 74 L. T. 572.

receive" the principal sum, although perhaps not a right to enforce payment of it. The distinction between those two rights was clearly pointed out in the judgment of the Court of Appeal in *Hornsey Local Board* v. *Monarch Investment Building Society*. (1) If the case does not come within s. 8, it must come within s. 1 of the Act of 1874.

Martelli, replied.

CHANNELL J. In this case a question of considerable difficulty came before the county court judge, who held that the plaintiff's claim was barred by lapse of time, and gave judgment for the defendant on that ground. Having fully considered the matter, we agree with that judgment. The plaintiff is a person at present entitled to be paid a yearly sum of money, and he also has a charge for a lump sum, being the sum which his predecessor originally paid to redeem land tax. He is not entitled to recover that lump sum, but if the tenant in possession desires to redeem the yearly sum, the plaintiff is the person who, on the option being exercised by the tenant, has the right to receive that lump sum. He is now, and has been for many years, entitled equitably to those rights in respect of that sum, and his legal title has recently been perfected by a proper assignment. He has not enforced payment, or received payment, of the annual sum for a period exceeding twelve years since the last payment of it to his predecessor in title, and there has been no acknowledgment of his right to it. The question is whether there is any Statute of Limitations which is applicable to the case, and prevents the plaintiff from bringing an action to recover that annual sum of money. Now, in determining that question the nature of the annual sum must be looked at in order to see whether any Statute of Limitations applies. The annual sum comes into existence under the words of the 123rd section of 42 Geo. 3, c. 116, which enacts that where any person, having any estate or interest (other than an estate of inheritance) in land, shall redeem the land tax charged thereon out of his own absolute property, the land "shall be and become chargeable for the benefit of such person . . . . his

(1) 24 Q. B. D. 1.

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executors, administrators, or assigns . . . . with the amount of the moneys paid as the consideration for the redemption of such land tax . . . , and with the payment of a yearly sum or sums of money by way of interest thereon, equal in amount to the land tax redeemed." Now, as I have said, the principal sum cannot be recovered; there is no machinery provided for recovering it, nor has the plaintiff any right to it unless the tenant in possession elects to pay it. Although it may be said to be charged upon the land as a debt, it is a debt which is not payable except at the option of another person, and which there is no power to enforce; but there is power to enforce by action payment of the yearly sum which the statute says is to be "by way of interest thereon." On the other hand, the person whose lands are charged with the principal sum may pay it off and free the lands from the sum charged and the interest thereon. This is an entirely special kind of property. I think it is personal property, because the principal sum is a sum charged upon the land just as a mortgage debt is; that is personal property, and the interest also. I say that because in cases where the yearly sum is received by way of rent or of rent-charge (also spoken of as being inheritances) it would not be personal property. I think the true view of the matter is that the yearly sum by way of interest, which is all that can be enforced, is a periodical sum of money charged upon land, and that the principal sum is merely the price at which the periodical sum can be redeemed. In substance, therefore, the person who has redeemed the land tax becomes entitled to a property which consists of a yearly sum payable out of land, and he is liable, but not entitled, to have that sum redeemed by the payment off of the principal sum. That being so, which (if any) of the sections in the real property Statute of Limitations does this case come under? There is no doubt that both the principal sum and the annual sum are charged upon land, and therefore, at the first sight, s. 8 of the Real Property Limitation Act, 1874, would apply, which provides that no action, suit, or other proceeding shall be brought to recover any sum of money charged upon or payable out of any land or rent, at law or in equity, but within twelve years next after a

present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless there has been part payment of the principal, or some interest thereon, or there has been an acknowledgment in writing. Now, although this is money charged upon land, so far as regards the principal no action can be or could ever have been brought to recover it. The section, therefore, has no application, because it only applies where an action can be brought; it must mean no action shall be brought where but for this enactment an action could be brought. If any doubt were possible as to that meaning, it is removed by the last words of the section, which point out the penalty or consequences where an action has not been brought within the specified time—"and in such case no such action shall be brought." It is important to bear in mind that no action can be brought in respect of the principal sum in the present case when one comes to consider the other sections of the Act. By s. 1 of 3 & 4 Will. 4, c. 27 (which is to be read together with the Act of 1874), "the word 'rent' shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land." By s. 1 of the Act of 1874, no person shall bring an action to recover any rent but within twelve years next after the right to bring such action shall have first accrued. If, then, the yearly payment in question here is a "periodical payment charged upon land" within the ordinary meaning of those words in s. 1 of the earlier statute, the right of action has gone. Is there any principle or decision which shews that such a yearly payment is not within the words? It has been held over and over again that ordinary rent-service does not come within them. There is the case of *Grant* v. *Ellis* (1), which proceeds substantially upon two grounds. The decision in substance amounted to adopting the argument of counsel for the defendants, which is summed up thus in the judgment of the Court (2): "The defendant contends that this is not a case within the statute at all. He contends that the word 'rent,' in the second section of the

(1) 9 M. & W. 113. (2) 9 M. & W. at p. 122.

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statute, cannot be taken as having reference to rents such as that now in question, namely, rents reserved on leases for years by contract between the parties, as the conventional equivalent for the right of occupation; but must be confined to rents existing as an inheritance distinct from the land, and for which before the statute the party entitled might have had an assise, such as ancient rent-service, fee farm rents, or the like. We accede to this latter view of the case." The two grounds upon which the judgment proceeds are, first, obviously that the rent reserved on a lease is a conventional equivalent for the right of occupation, i.e., that it is not a property carved out of the land and independent of the right to the land; and, secondly, that the statute applies to rents existing as an inheritance distinct from the land. I do not think that the Court meant that the operation of the statute is confined strictly to rents which are inheritances, or to say that a property carved out of the land such as this periodical payment could not be "rent" within the definition. The rents which they had in mind, namely, rents existing as an inheritance distinct from the land, were in fact real property; but if by statute a periodical payment charged upon the land is created, and is a property distinct from the land, although (by an anomaly, if you like) not real property, it is, I think, "rent" within the meaning of the statute. It is within the natural meaning of the words "periodical sums of money charged upon or payable out of any land," and I see no difficulty in so treating it. It is in every way analogous to a rent-charge, except that by the peculiar way in which it is created and made redeemable it appears to be made personal property, and is, therefore, not an inheritance. But for that fact it would come clearly within the definition of rent adopted in *Grant* v. *Ellis*. (1) If I am wrong in thinking this to be personal property, it is, I think, quite clearly "rent," and there is no difficulty at all in the case. If it be not "rent" within the definition, there is no Statute of Limitations which applies to it at all. I agree that ordinary interest upon a mortgage could not be called "rent" within the definition; but the reason is that the interest is paid as the conventional

(1) 9 M. & W. 113.

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consideration for the forbearance to enforce payment of the mortgage debt, as the rent reserved on a lease is the conventional equivalent for the right of occupation. When the mortgage debt has gone the right to interest has gone also; no statute enables you to recover interest after the right to recover the principal has been lost. In the case of a mortgage the interest is dependent upon and accessory to the principal; but in the present case it is rather the capital sum which is accessory to the periodical sum payable by way of interest, because it only comes in as the measure of the value to be paid for the yearly sum if that is redeemed. For these reasons I am of opinion that the 2nd section of the Statute of Limitations applies; that this is a periodical payment within the meaning of s. 1; that the right to recover it after the lapse of twelve years has gone; and, therefore, that our judgment should be for the defendant.

BUCKNILL J. I agree, and I have nothing to add.

Appeal dismissed. Leave to appeal.

Solicitor for appellant: *T. Parsons.*
Solicitors for respondent: *Bayley, Adams, Hawker & Noble.*

W. A.

1901
March 18;
April 1.

In re RIGGS.
Ex parte LOVELL.

Lease—Covenant not to Assign—Proviso for Re-entry on Bankruptcy or Breach of any Covenant—Lessee adjudicated Bankrupt on his own Petition—Forfeiture—Peaceable Re-entry by Lessor—Notice—Relief—Conveyancing Act, 1881, *s.* 14, *sub-ss.* 1, 2, 6—*Conveyancing Act*, 1892 (55 & 56 *Vict. c.* 13), *s.* 2, *sub-s.* 2—*Bankruptcy Rules*, 1886, *r.* 190.

A lease contained a covenant not to assign without licence, and a proviso for re-entry on bankruptcy of the lessee or breach of any covenant. The lessee having been adjudicated bankrupt on his own petition, the lessor purported to determine the lease under the proviso of re-entry, and obtained peaceable possession from the lessee without giving any notice under s. 14 of the Conveyancing Act, 1881 :—

Held, that the lessor's re-entry was void as against the lessee's trustee in bankruptcy, for the statutory notice was necessary before the lessor could obtain possession either peaceably or by action.

Held, also, that the lessee's being adjudicated bankrupt on his own petition did not operate as a breach of his covenant not to assign.

THIS was an application by the trustee in bankruptcy to obtain a declaration that he was entitled to certain leasehold premises under the following circumstances.

By deed dated November 12, 1896, J. W. Hobbs demised to one John Riggs a house and premises at Buckhurst Hill, in the county of Essex, known as "Riggs' Retreat," for the term of nine years from March 25, 1897, at the yearly rent of 168*l.* 5*s.*, payable quarterly. The lease contained a covenant by John Riggs not to assign or underlet the demised premises without the consent in writing of J. W. Hobbs, and a proviso for re-entry if the rent should be in arrear for twenty-one days, "or if the said John Riggs shall become bankrupt, or file any petition under the bankruptcy laws, or make any composition with his creditors, or upon any breach of the covenants herein contained, the said J. W. Hobbs may re-enter upon the said premises, and immediately thereupon the said term shall absolutely determine." The lease also contained an agreement by J. W. Hobbs that, on payment of the rent and performance of the covenants

and conditions therein contained, he would at the expiration of the lease convey without any further payment or consideration whatever to the said John Riggs the fee simple of the demised premises free from incumbrances.

On January 18, 1901, a receiving order was made against John Riggs on his own petition, and the same day on his own application he was adjudicated a bankrupt.

On January 22, before the trustee in bankruptcy had been appointed, J. W. Hobbs purported to re-enter and take possession of the demised premises and to determine the lease under the proviso for re-entry. Before doing so he gave no notice under s. 14 of the Conveyancing and Law of Property Act, 1881, or otherwise, except the following notice, which his agent on taking possession affixed to the door of the premises :—

"To John Riggs of 'Riggs' Retreat,' Buckhurst Hill, in the county of Essex, refreshment contractor, and to all other parties whom it may concern.

"I, Joseph William Hobbs, of Oakhurst, Chingford, in the county of Essex, gentleman, hereby give you notice in pursuance of the proviso contained in an indenture of lease dated the 12th of November, 1896, made between me of the one part and you, the said John Riggs, of the other part, that I hereby re-enter upon the premises comprised in the said indenture of lease and determine the same in pursuance of the proviso in the said lease, you having become bankrupt and filed your petition under the bankruptcy laws, and I hereby take possession of the said premises with the appurtenances comprised in the said lease from you as from the date hereof.

"As witness my hand this 22nd day of January, 1901.

"J. W. Hobbs."

The lease was valuable, and on February 15 the trustee in bankruptcy demanded possession of the demised premises from J. W. Hobbs, which was refused. Thereupon the trustee now applied to the Court for a declaration that he was entitled to the said lease, and for an order on J. W. Hobbs to give him possession of the premises; or, in the alternative, that relief might be granted to him against any right of re-entry upon or

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forfeiture of the premises that might have accrued to J. W. Hobbs.

Muir Mackenzie, for the application. The joint effect of sub-s. 2 of s. 2 of the Conveyancing Act, 1892, and sub-s. 6 of s. 14 of the Conveyancing Act, 1881, is that forfeiture on bankruptcy is excluded for one year from the date of the bankruptcy: *Horsey Estate* v. *Steiger*. (1)

[*Rowden, K.C.*, for the lessor. This is admitted; but the lessor's contention is, first, that the application for relief where re-entry is complete is too late: *Quilter* v. *Mapleson* (2); and, secondly, that under the circumstances the bankruptcy operated as a breach of the covenant not to assign.]

Sect. 14, sub-s. 1, of the Conveyancing Act, 1881, prohibits re-entry "by action or otherwise" unless and until the lessor gives notice, and it must be a reasonable notice: *Horsey Estate* v. *Steiger* (1); *North London Land Co.* v. *Jacques* (3); *Rogers* v. *Rice* (4); *Lock* v. *Pearce*. (5) The words "or otherwise" point to a re-entry other than by action, i.e., peaceable re-entry. Here the lessor has given no notice to the trustee. He has, therefore, re-entered wrongfully, and the trustee is entitled to possession. As to the second point, under the old law bankruptcy did not operate as a breach of a covenant not to assign: *Doe* v. *Bevan*. (6) The same principle applies to an adjudication in bankruptcy under the Act of 1883. The covenant contemplates an operative act under the hand of the lessee by which he assigns the lease to some one else, not an act by which the lease by operation of law vests in some one else.

Rowden, K.C., and *E. Ball*, for the lessor. This is not an action or proceeding by the lessor to enforce the forfeiture. It is admitted that notice is necessary if the re-entry is not complete, but it is contended that notice is not necessary where re-entry is complete. It is settled that where the lessor has in an action under sub-s. 2 obtained possession, relief cannot be granted: *Quilter* v. *Mapleson* (2); *Lock* v. *Pearce*. (5) The

(1) [1899] 2 Q. B. 79.
(2) (1882) 9 Q. B. D. 672.
(3) (1883) 32 W. R. 283.
(4) [1892] 2 Ch. 170.
(5) [1893] 2 Ch. 271, at p. 274.
(6) (1815) 3 M. & S. 353; 16 R. R. 298.

same principle applies where the lessor obtains possession under sub-s. 1 in good faith by other means. Here, he has obtained peaceable possession. His re-entry is complete, and relief cannot be given. Secondly, the lessee's adjudication in bankruptcy operated as a breach of the covenant not to assign, because it was the necessary and inevitable result of his own voluntary act. It falls within the principle applicable to the forfeiture of an estate on alienation, and the cases shew that a voluntary alienation operates as a forfeiture whilst a compulsory alienation does not: *Croft* v. *Lumley* (1); *Avison* v. *Holmes* (2); *Rochford* v. *Hackman* (3); *In re Amherst's Trusts* (4); Yate Lee on Bankruptcy, p. 353. Here the lessee was adjudicated bankrupt not merely on his own petition, but on his own application under rule 190 of the Bankruptcy Rules, 1886.

Muir Mackenzie, in reply, cited *Ex parte Gould* (5); *Ex parte Dawes*. (6)

Cur. adv. vult.

April 1. WRIGHT J. This is an application by the trustee in bankruptcy of John Riggs for a declaration of his title to a lease of certain premises made to the debtor. The lease contains a covenant by the lessee and a proviso, which are in the following terms: [The learned judge read the covenant not to assign and the proviso for re-entry, and continued:—]

In January, 1901, the debtor filed his own petition expressly asking for adjudication; and on January 18 a receiving order was made; and on the same day, under the power given by rule 190, he was adjudicated bankrupt on that petition. By virtue of the adjudication the bankrupt's interest in the lease vested in the official receiver until some time early in February, when the trustee was appointed. On January 22 the lessor entered upon the premises, alleging that under the proviso for re-entry the lease was determined by the bankruptcy or petition. He did not before entry give the statutory notice which is

(1) (1858) 6 H. L. C. 672.
(2) (1861) 1 J. & H. 530.
(3) (1852) 9 Ha. 475.
(4) (1872) L. R. 13 Eq. 464.
(5) (1884) 13 Q. B. D. 454.
(6) (1886) 17 Q. B. D. 275.

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required by s. 14 of the Conveyancing Act, 1881, in cases to which that section applies.

The first question is whether under the Conveyancing Act, 1881—assuming the case to be one in which by sub-s. 1 of s. 14 of that Act the statutory notice is required to be given as a preliminary to the exercise of a right of re-entry by action under a proviso for breach of a covenant or condition in a lease—the notice is necessary as a preliminary to re-entry without action. On this question I cannot entertain any doubt. Sub-s. 1 of s. 14 says that the right of re-entry or forfeiture "shall not be enforceable by action *or otherwise* unless or until the lessor serves on the lessee a notice specifying, &c." No mode of enforcing such a right otherwise than by action has been suggested except that of peaceable entry. And the language of sub-s. 2—"the lessee may in the lessor's action, *if any*, &c."—indicates that entry without action is within the purview of sub-s. 1. Nor has any reason been suggested why the notice is less necessary in the one case than in the other. The only argument advanced in favour of the lessor's contention on this point is that in one or two cases, in particular in *Horsey Estate* v. *Steiger* (1), some expressions are found which in terms refer only to cases in which actions are brought; but in those cases actions had been brought, and these expressions seem plainly to refer only to the circumstances of the particular cases. If this view is right, then according to the decision just cited the trustee is entitled to succeed so far as this case depends on forfeiture for bankruptcy, because it was there held that s. 14, sub-s. 1, of the Act of 1881 is applied to re-entry under a condition for forfeiture for bankruptcy by s. 2, sub-s. 2, of the Conveyancing Act, 1892, with exceptions which do not cover this case.

The second and the real question is whether an adjudication of bankruptcy on the debtor's own petition asking for adjudication, although it does not directly justify the entry without notice, yet does so indirectly, as being or involving a breach of his covenant not to assign without the consent of the lessor. If it is, then sub-s. 1 of s. 14 of the Act of 1881 is excluded by

(1) [1899] 2 Q. B. 79.

sub-s. 6 of the same section, which is not, as regards assignments, affected by the Act of 1892; and in that view the re-entry may have been effectual on the ground of the assignment, although not on the ground of the bankruptcy. On the construction of this lease, and apart from authority, I should be of opinion that in this covenant the words "assign or underlet" are used in their ordinary or popular sense, and refer only to such assignments as are directly made by the lessee as distinguished from such assignments by law as result by the statute from a petition in bankruptcy followed by adjudication. This conclusion seems much strengthened by the fact that the proviso, which immediately follows the covenant, expressly provides for the case of bankruptcy or of the filing of a petition by the debtor. And it would be strange if, notwithstanding the express mention of bankruptcy as a ground for re-entry, and the express obligation to give notice before re-entry on that ground, the obligation can be evaded on the ground that the bankruptcy operates in law as an assignment. It has indeed in several cases been held upon the construction of wills containing provisions for the defeasance of interests in case of assignment or incumbrance, that although bankruptcy upon the initiative of a creditor is not to be regarded as amounting to an assignment or incumbrance by the act of the debtor (see *Doe* v. *Bevan* (1), *Lear* v. *Leggett* (2), *Holland* v. *Cole* (3), and *Doe* v. *Powell* (4)), yet the assignment which necessarily and inevitably resulted under the Insolvents Relief Acts from a debtor's petition under those Acts did amount to a voluntary assignment or incumbrance or disposition: *Shee* v. *Hale* (5); *Rochford* v. *Hackman.* (6) But in all the cases of that kind which I have found, the words used in the will were much larger than the mere word "assign." They have usually been the most comprehensive which the draftsman could find. For instance, in *In re Amherst's Trusts* (7), they were "assign over, assure, mortgage, or in any manner incumber, or by any

(1) 3 M. & S. 353.
(2) (1830) 1 Russ. & My. 690.
(3) (1862) 1 H. & C. 67.
(4) (1826) 5 B. & C. 308; 29 R. R. 253.
(5) (1807) 13 Ves. 404.
(6) 9 Ha. 475.
(7) L. R. 13 Eq. 464.

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instrument in writing, parol agreement, or otherwise howsoever part from" the income. Moreover, all those cases except *In re Amherst's Trusts* (1) were determined upon statutes under which the debtor's petition ipso facto effected an assignment of the debtor's property for the benefit of creditors; but under the Act of 1883, even upon a debtor's petition asking for adjudication, the adjudication does not follow automatically. The Court has a discretion in the matter, and, unless the Court in its discretion adjudicates, the creditors may prefer to accept a composition. Therefore Cave J., in *Ex parte Dawes* (2), held that the debtor's petition under the Act of 1883 did not of itself amount to an assignment. In that case the creditors had accepted a composition, so that there was no adjudication and no vesting of the debtor's property in a trustee; but the case seems to be an authority that the mere filing of a petition by a debtor is not of itself an assignment. And if so, then there is in any view no assignment until adjudication, and at that stage the matter has become actual bankruptcy, and therefore s. 2 of the Act of 1892 applies, and requires the statutory notice. Lastly, if the filing of a petition by the debtor is not of itself an assignment until adjudication, then it is not of itself a ground for re-entry without the statutory notice. For either it is bankruptcy, in which case s. 2 of the Act of 1892 applies, or, if it is neither assignment nor bankruptcy, sub-s. 6 of s. 14 of the Act of 1881 does not apply, and therefore sub-s. 1 of s. 14 does apply, and the notice is necessary. I am of opinion, therefore, that the trustee is entitled to the declaration for which he asks.

Solicitors for trustee: *Bramall, White & Co.*
Solicitors for lessor: *Lucas & Mitchell.*

(1) L. R. 13 Eq. 464. (2) 17 Q. B. D. 275.

H. L. F.

[IN THE COURT OF APPEAL.]

C. A.
1901
April 2.

DUXBURY AND OTHERS *v.* BARLOW AND RICHARDSON.

Practice—Costs—Action of Contract against two Defendants—Separate Causes of Action—Judgment for 50*l. against both Defendants, and for more than* 50*l. against one Defendant—County Courts Act,* 1888 (51 & 52 *Vict. c.* 43), *s.* 116—*Rules of Supreme Court, Order* LXV., *r.* 12.

The defendants B. and R. entered into a joint and several bond in 50*l.* to the plaintiffs, who were the trustees of a friendly society, to secure the fidelity of the defendant B., who was the treasurer of the society. B. having failed to account for 90*l.*, the plaintiffs brought an action in the High Court against both defendants, in which they recovered judgment for 50*l.* against both defendants and for 90*l.* against the defendant B., with costs against the defendant B. and such costs against the defendant R. as they were entitled to. The judge who tried the case having refused to certify that the case was fit to be tried in the High Court :—

Held, that as against the defendant R. the plaintiffs were only entitled to costs on the county court scale.

APPEAL from an order of Grantham J. at chambers, as after mentioned.

The plaintiffs were the trustees of the National Equalised Druids' Friendly Society, of which society the defendant Barlow was the treasurer.

The defendant Richardson had jointly with the defendant Barlow entered into a joint and several bond to the plaintiffs for the sum of 50*l.* as security for the fidelity of the defendant Barlow.

Barlow having failed to account for the sum of 90*l.* 9*s.*, moneys of the society, the plaintiffs brought an action against both defendants in the High Court claiming 50*l.* against both defendants on the bond, and 90*l.* 9*s.* against the defendant Barlow. The action was tried before Wright J. without a jury at the Leeds Assizes on December 14, 1900. Barlow did not appear, and the learned judge gave judgment against the defendants, which was drawn up in the following form: "It is this day adjudged that the plaintiffs recover from both the

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defendants the sum of 50*l.*, and it is further adjudged that the plaintiffs recover from the defendant Barlow 90*l.* 9*s.*, with costs against the defendant Barlow and such costs against the defendant Richardson as they are entitled to."

The learned judge declined to certify that the case was fit to be tried in the High Court. On taxation the master was of opinion that the plaintiffs were not entitled to costs on the High Court scale as against the defendant Richardson. Grantham J. on appeal reversed the decision of the master, and directed that the costs should be taxed on the High Court scale. The defendant Richardson appealed.

Brooke Little, for the appellant. The plaintiffs are not entitled to costs on the High Court scale as against the appellant. Sect. 116 of the County Courts Act, 1888, provides that where in an action founded on contract the plaintiff shall recover less than 50*l.* he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court, and in *Millington* v. *Harwood* (1) it was decided that where a plaintiff in such an action recovers 50*l.* and no more he is only entitled to costs on the county court scale, and that Order LXV., r. 12, applies. That rule provides that in actions founded on contract in which the plaintiff recovers a sum "not exceeding 50*l.*" he shall only be entitled to costs on the county court scale. The plaintiffs' causes of action against the defendant Barlow and the appellant are separate and distinct, and since they have only recovered against the appellant a sum not exceeding 50*l.* they are not entitled to costs on the High Court scale as against him. This case is really governed by the decision of this Court in *Solomon* v. *Mulliner* (2), in which though the action was one of tort the principle applies.

Ellis Hill, for the respondents. The respondents have recovered more than 50*l.* in the action since judgment for 90*l.* 9*s.* was given against Barlow. There was one action and one judgment against both defendants, which distinguishes the case

(1) [1892] 2 Q. B. 166. (2) [1901] 1 Q. B. 76.

from *Solomon* v. *Mulliner* (1), where there were really separate actions against the two defendants, as was pointed out by the Court. In this case the defendants might have taken out a summons calling on the plaintiffs to elect on which cause of action they would proceed, but as they did not do so there is only one judgment, which is for an amount exceeding 50*l.*, and the plaintiffs are therefore entitled to costs on the High Court scale against both defendants.

A. L. SMITH M.R. This is an appeal from an order of my brother Grantham at chambers. In my opinion, on the true construction of Order LXV., r. 12, which admittedly governs the case, the decision to which he came was wrong.

The plaintiffs, who were the trustees of a friendly society, sued the defendants Barlow and Richardson on a joint and several bond for 50*l.*, and in the same action they joined a claim against Barlow for 90*l.* 9*s.*, moneys of the society, for which acting as treasurer he had failed to account. Those are two separate and distinct causes of action. They are separate and distinct on the writ, they were separate and distinct at the trial, and they are separate and distinct in the judgment.

It is now contended that although the plaintiffs only got judgment for 50*l.* against the defendant Richardson, and although they could not get a certificate from the judge who tried the case that the action was one fit to be heard in the High Court, nevertheless they are entitled to costs on the High Court scale as against Richardson. Order LXV., r. 12, says that in a case where the plaintiff recovers a sum not exceeding 50*l.*, he shall be entitled to no more costs than he would have been entitled to if he had brought his action in a county court. What is the obvious meaning of that? Against whom is it that he is entitled to get no more than county court costs? Clearly against the persons against whom he has got judgment for a sum not exceeding 50*l.* Therefore, as it seems to me, there was no power to make the order which Grantham J. did, and we must say that as against the defendant Richardson the

(1) [1901] 1 Q. B. 76.

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plaintiffs are not entitled to more costs than they would have got if they had brought their action in the county court.

COLLINS and ROMER L.JJ. concurred.

Appeal allowed.

Solicitors for appellant: *Vincent & Vincent, for Peckover & Scriven, Leeds.*

Solicitors for respondents: *Jaques & Co., for J. C. Malcolm, Leeds.*

A. P. P. K.

1901 *Feb.* 7.

KEETON *v.* SHEFFIELD COAL COMPANY.

Justices—Practice—Recovery of Rates—Limitation of Time—"Complaint"—Summary Jurisdiction Act, 1848 (11 & 12 *Vict. c.* 43), *s.* 11.

The occupiers of a rateable hereditament, which had been assessed to certain poor-rates and general district rates upon the rateable value in the valuation list then in force, appealed against the poor-rates. Before the appeal was heard, payment of the general district rates was demanded by the local authority, and a sum was paid and accepted on account of each of those rates. The rateable value of the premises in the valuation list having been reduced as a result of the appeal, the figures of the general district rates already made were altered in the rate-book, and payment was demanded of the balance owing of the rates so reduced. Payment having been refused, a summons to enforce payment was issued at a date which was more than six months after the demand of the original amount of the rate, but within six months of the demand of the balance of the rate as amended:—

Held, that the matter of complaint, within the meaning of s. 11 of the Summary Jurisdiction Act, 1848, was the non-payment of the balance of the rates as amended, that it had therefore arisen within six months of the issue of the summons, and that the right of the local authority to recover the balance was not barred by the provisions of that section.

CASE stated by justices.

The respondents had appeared to answer a summons taken out by the appellant, a collector of rates, on behalf of the urban council of Handsworth, for payment by the respondents of 869*l.* 3*s.* in respect of rates. Upon the hearing of the summons the following facts were proved or admitted.

The respondents were the rateable occupiers of a large

rateable hereditament at Handsworth, which comprised a coal mine and shafts, called the Birley Collieries, and the land, buildings, fixed plant, machinery, and buildings connected therewith. On November 6, 1897, a supplemental valuation list was made, in which the rateable value of the respondents' premises was raised from a lower figure to 10,137*l.*, and on December 28, 1897, a poor-rate was made, in which the respondents were rated upon that rateable value in respect of their premises; at that time an objection was pending against the valuation list. On March 23, 1898, a general district rate was made by the Handsworth Urban Council, the respondents' premises being assessed to it upon the rateable value of 10,137*l.*, the amount of the rate being 1520*l.* 11*s.*, payable in two instalments. On June 21, 1898, a second poor-rate was made, in which the respondents were assessed at the same rateable value. On July 28, 1898, payment was demanded of the first instalment of the general district rate; on September 23, 1898, the respondents paid 356*l.* 8*s.* 6*d.*, which was accepted by the council on account of the first half of the general district rate. On October 25, 1898, payment of the second instalment of the general district rate was demanded, and on March 27, 1899, the respondents paid 356*l.* 8*s.* 6*d.*, which was accepted by the council on account of the rate. On November 22, 1898, a third poor-rate was made upon the same assessment, and on March 22, 1899, a general district rate of 3*s.* 4*d.* in the pound was made by the council upon the same rateable value, amounting to 1689*l.* 10*s.*, payable in two instalments.

On April 21, 1899, the respondents lodged an appeal against all the three poor-rates, but not against either of the district rates. On May 10 and October 17, 1899, respectively, payment of the two instalments of the general district rate of March 22 was demanded, and on September 29, 1899, and April 5, 1900, respectively, the respondents paid 475*l.* 9*s.* 10*d.* and 450*l.* on account of that rate.

The appeals against the poor-rates had meanwhile been referred to arbitration, and on January 4, 1900, the arbitrator by his award fixed the rateable value of the premises for the periods relating to the first two poor-rates at 7517*l.* 9*s.* 9*d.*, and

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for the period relating to the third poor-rate at 8279*l.* 4*s.* 1*d.* In accordance with the award, the valuation lists upon which the poor-rates were based were duly altered, and on March 19, 1900, the figures of the general district rates were altered in the rate-book, the following being the amendments made: the rateable value of the premises to the first general district rate was altered from 10,137*l.* to 7517*l.* 9*s.* 9*d.*, and the amount of the rate from 1520*l.* 11*s.* to 1127*l.* 12*s.* 6*d.*; and the rateable value of the premises to the second general district rate was altered from 10,137*l.* to 8279*l.* 4*s.* 1*d.*, and the amount of the rate from 1689*l.* 10*s.* to 1379*l.* 17*s.* 4*d.* On May 30, 1900, and June 14, 1900, payment was demanded of arrears of the general district rates amounting to 869*l.* 3*s.*, which was thus arrived at: from the sum of 1127*l.* 12*s.* 6*d.*, the amount of the first general district rate as altered by the award, were deducted the two payments on account of 356*l.* 8*s.* 6*d.* each, leaving a balance of 414*l.* 15*s.* 6*d.*; and from the sum of 1379*l.* 17*s.* 4*d.*, the amount of the second general district rate as altered, were deducted the two payments on account of 475*l.* 9*s.* 10*d.* and 450*l.*, leaving a balance of 454*l.* 7*s.* 6*d.* The respondents refused to pay the total balance of 869*l.* 3*s.*, and on July 24, 1900, the present summons was issued.

At the hearing the respondents contended that the matter complained of arose more than six months before the issue of the summons, and that the recovery of the amount claimed was barred by s. 11 of the Summary Jurisdiction Act, 1848. For the appellant it was contended that until the general district rates had respectively been altered so as to agree with the valuation lists as amended in accordance with the award, no valid demand could be made upon the respondents by the council in respect of either of the rates, that payment of the amount claimed had been demanded within six months of the issue of the summons, that the matter of the complaint in respect of which the summons was issued arose within six months, and that the claim was not barred by the section.

The justices were of opinion that the recovery of the amount claimed by the council was, under the circumstances hereinbefore stated, barred by s. 11 of the Summary Jurisdiction

Act, 1848, and dismissed the summons. The question for the opinion of the Court was whether they were right in so doing.

Hugo Young, K.C. (*R. Cunningham Glen* with him) for the appellant. The matter complained of arose within six months of the issue of the summons, and the remedy of the appellant is not barred by reason of s. 11 of the Summary Jurisdiction Act, 1848. The matter of complaint was non-compliance with the demand for payment of the rate, and the demand was made within six months of the laying of the complaint. For this purpose the original demand cannot be looked at; although a good demand at the time when it was made, it was not a lawful demand of the rate as altered after the appeal had been successful. The demands of May 30 and June 14, 1900, which were within the six months, were lawful demands within s. 256 of the Public Health Act, 1875, being demands of the amended and reduced rate or of the balance of it then owing; that smaller sum the council had no right to demand before the reduction of the rate; they had until that date no right to demand anything but the larger sum, which was the original rate as based upon the unamended valuation list, and that larger sum would, if pressed for, have been originally recoverable. It cannot be successfully contended that the only course open to the council was to enforce the original rate, which was shewn to be an improper rate, and that because they contented themselves during the appeal with accepting a sum on account they are now debarred from enforcing their claim to the amount to which they are justly entitled.

Tindal Atkinson, K.C. (*T. E. Ellison* with him), for the respondents. The justices were right. The cause of complaint was the non-payment of the original rates, and the complaint should have been laid within six months of the time when that cause of complaint arose; failing that, the remedy of the council is gone. The demands relied upon were not demands for the payment of a new rate; the old rates were the only enforceable rates, for no appeal lies against a district rate, which is based on the valuation list in force for the time being, though the quantum is affected by a successful appeal against

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the valuation list. The council were guilty of laches in not enforcing their remedy at the time, and that remedy is not revived by an alteration in the valuation list and a fresh demand for a smaller sum in respect of the old rate. Further, where a Statute of Limitations runs so as to afford a defence to an action for the recovery of a definite sum, a creditor cannot successfully sue for a portion of that sum after the period of limitation has expired.

Hugo Young, *K.C.*, in reply.

WILLS J. I am of opinion that the decision of the justices was wrong, and that the amount of the amended rate is recoverable under the circumstances of the case. What was demanded, and was the subject of the summons, was the amended and reduced amount. Until it had been reduced by the competent authority, and until the rate had been amended, there was no right in the council to demand the smaller sum; they had a right to demand the larger sum, and I think (though it is not necessary to decide the point) that if the larger sum had been demanded and a summons had been taken out for its recovery, there would, as matters stood, have been no answer to it. If that had been the case, it would have been useless to proceed upon a summons for recovery of the reduced amount, for the larger sum would have been recoverable, and no body in the position of the council would have thought of taking out a fresh summons. I think also that the excess might have been recovered by a person who had paid too much, although that point again it is unnecessary to decide; I cannot think that such a payment would have been allowed to stand, and there are ample reasons to be found, both in the particular legislation and in the general law, why the excess should under such circumstances be recoverable.

I desire to base my judgment in this case upon the fact that the moment the rate was reduced in consequence of the proceedings pointed out by statute, there came into existence for the first time a right on the part of the council to demand the reduced sum. It has been contended by counsel for the respondents that, if a man owes a definite sum and the Statute

of Limitations runs so as to afford a defence to an action for the recovery of that sum, his creditor cannot recover half of it after the period of limitation has run out. I entirely assent to that simple proposition; but, if there be the added fact that by reason of legislation or of fresh circumstances a new right has been subsequently created which makes the smaller sum for the first time a debt, the matter becomes very different. In the present case we must, in view of the language of s. 11 of the Act of 1848, consider when the matter of complaint first arose. The complaint is that the respondents have not paid the amended rate, and that rate, like every other rate, must follow the valuation list in force at the time. The amended valuation list was not the valuation list in force until the amendment had been made, and, therefore, the rate which is amended in accordance with the amended valuation list becomes then for the first time the instrument which imposes upon the rate-payer the duty of paying the smaller amount. I think, therefore, that the case, when once the facts have been mastered, is free from difficulty, and that the law is consonant with what sound reason and common sense point out—that the reduced amount payable has not been extinguished by the payments on account of a larger sum made under such circumstances as those in the present case. I am clearly of opinion that the appellant is entitled to our judgment, and that the case must go back to the justices to make the proper order for payment of the arrears of the reduced rate.

CHANNELL J. I am of the same opinion for the same reasons.

Appeal allowed.

Solicitors for appellant: *Crowders, Vizard & Oldham, for Creswick & Son, Sheffield.*

Solicitors for respondents: *Dollman & Pritchard, for H. & A. Maxfield, Sheffield.*

W. J. B.

C. A.
1901
March 8.

[IN THE COURT OF APPEAL.]

In re R. S. A.

Bankruptcy—Lunatic Debtor—English Lunacy—Committee—Curator Bonis—Scottish Jurisdiction—Locus Standi—Bankruptcy Proceedings by Committee—Right to represent Lunatic—Lunacy Jurisdiction—Procedure—Consent of Court in Lunacy to Bankruptcy Proceedings—Directions, Summons for—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 148.

Where, in an English lunacy, a committee has been appointed, a curator bonis appointed by the Scottish Court of the lunatic's estates in Scotland (especially where appointed, prior to the lunacy, on account of physical incapacity) has no locus standi, under s. 148 of the Bankruptcy Act, 1883—which provides that, for the purposes of the Act, "a lunatic may act by his committee or curator bonis"—to intervene in English bankruptcy proceedings by the committee in the name and on behalf of the lunatic. The committee is, when appointed, the only person entitled under the section to represent the lunatic in the proceedings, and the curator bonis is only entitled to act therein for the lunatic where there is no committee.

Where the committee of a lunatic debtor has been authorized by the Court in Lunacy to take preliminary proceedings with a view to making him bankrupt, by filing in his name a declaration of insolvency, no subsequent steps, such as admitting the debt of a creditor who may have presented the bankruptcy petition, or consenting to an adjudication, should be taken by the committee without first obtaining the sanction of the Court in Lunacy.

In October, 1898, the debtor, R. S. A., a Scotsman resident in London, being the owner of large heritable estates in the county of Fife, subject to heavy incumbrances, presented a petition to the Court of Session in Scotland for the appointment of a curator bonis of the estates, on the ground that he was then seventy-four years of age and was in very infirm health through having recently undergone a severe and painful operation, which had rendered him quite incapable of managing his affairs. Upon that petition the Court, on November 12, 1898, made an order, expressly on that ground, appointing a curator bonis.

In the latter part of 1899 the debtor, while still resident in London, became of unsound mind, and on January 19, 1900, a committee of his estate was appointed by the English Court in

Lunacy. The debtor having incurred considerable debts in England and being practically insolvent, the Lords Justices sitting in Lunacy on January 21, 1901, made an order, upon an ex parte application made by the committee, directing him, in the name and on behalf of the lunatic, to file a declaration in bankruptcy of the inability of the lunatic to pay his debts, and, if necessary, to present a bankruptcy petition against him; and on January 25, 1901, the committee filed a declaration accordingly.

On February 1, 1901, certain English creditors of the lunatic presented a bankruptcy petition against him, alleging, as his act of bankruptcy, the filing of the declaration of his inability to pay his debts.

Upon the petition coming on for hearing before the registrar on February 19, 1901, the committee expressed his willingness to consent to a receiving order being made, but the curator bonis appeared by counsel to oppose the making of the order, having previously given notice that he intended to oppose it and to dispute the petitioners' debt and the act of bankruptcy, and also to contend that in the circumstances of the case no receiving order ought to be made. It was, however, contended by counsel on behalf of the petitioning creditors that the curator bonis had no locus standi and was not entitled to appear in the proceedings at all. The registrar held that the curator bonis had a locus standi to be heard; but he adjourned the further hearing of the petition for the purpose of enabling the petitioners to apply to the Court of Appeal for its decision as to the right of the curator bonis to appear in the proceedings.

The petitioners thereupon appealed from the registrar's decision.

The appeal was heard on March 8, 1901.

Carrington, for the appellants, the petitioning creditors. The claim of the curator bonis to intervene in these bankruptcy proceedings can only rest upon s. 148 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), which says that, "For all or any of the purposes of this Act . . . . a lunatic may act by his committee or curator bonis." Now here, in the first place, the

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curator is not the curator of the "lunatic" at all: he was appointed, not on the ground of mental, but of physical disability only. Therefore the section has no application, and this curator cannot represent the lunatic.

In the second place, even if he were the curator of the lunatic, he could not interfere, a committee having been properly appointed. What the section means is, that in the case of a lunatic in England or Ireland, who is represented by his committee, he shall act by his committee, and that in the case of a lunatic who is represented only by a Scottish curator, he shall act, if necessary, in English bankruptcy proceedings, by his curator. The registrar cannot have the lunatic represented in bankruptcy proceedings by two antagonistic persons. The Court sitting in Lunacy has come to the conclusion that it will be for the benefit of the lunatic to be made a bankrupt, and yet the curator claims to dispute the creditors' proceedings for making the lunatic bankrupt, on the ground that, according to Scottish law, a person who has a curator cannot incur a debt. This curator has no locus standi whatever to interfere in proceedings which have been directed by the Court in Lunacy here, and the lunatic is for all purposes properly and sufficiently represented by his committee.

A. E. Balfour, for the respondent, the committee, in support of the appeal.

Muir Mackenzie, for the respondent, the curator bonis, objected that, as the committee was a respondent to the appeal, he had no locus standi to be heard in support of the appellants' case.

RIGBY L.J. We wish to hear the views of the committee.

A. E. Balfour, for the committee. The committee is the proper person to represent the lunatic in this country. The Court of Bankruptcy cannot have before it two independent persons representing a lunatic. The order that has been made by the English Court in Lunacy directing the committee, on behalf of the lunatic, to file a declaration of insolvency, and so to commit an act of bankruptcy, with a view to bankruptcy

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proceedings, has the effect of enabling the committee to override the Scottish curator bonis. If the committee acts improperly in the proceedings, that is a matter for the jurisdiction of the English Court, not for the curator bonis. It would be intolerable to have the lunatic represented by two sets of persons, running up separate sets of costs. The position of a foreign curator of a lunatic is laid down in several cases, of which *Didisheim* v. *London and Westminster Bank* (1) is the latest. The Court recognises his right to sue in this country in respect of money standing in court in the name of the lunatic, and to apply, if necessary, to get that money out; but in none of the cases do we find the circumstances we have here—the lunatic residing in England, and the appointment of a committee in England. In such circumstances, the curator bonis cannot be a proper person to represent the lunatic. In *Ex parte Robinson, In re Robinson* (2) it was held that the trustee under a Scottish sequestration had no locus standi to appear in an English bankruptcy. That was on the principle that two separate persons could not be allowed to represent a debtor in this country. Again, in another bankruptcy case, *In re Artola Hermanos* (3), though the point was not taken in argument and therefore not actually decided, Fry L.J. expressed a "great doubt whether the (French) syndic has any locus standi whatever, either to oppose the pronouncing of a receiving order in this country, or to apply for its rescission after it has been pronounced." The broad point—who ought to be the administrator in this country of the estate of this lunatic, has already been decided by the appointment of a committee, and it is submitted that he is the proper person to represent him throughout the bankruptcy proceedings.

Muir Mackenzie, for the respondent, the curator bonis. *Ex parte Robinson, In re Robinson* (4) has no application, for the person intervening was a Scottish trustee under a sequestration not representing the bankrupt at all, but only the creditor. *In re Artola Hermanos* (5) mainly turned on the question of

(1) [1900] 2 Ch. 15.
(2) (1883) 22 Ch. D. 816, 818.
(3) (1890) 24 Q. B. D. 640, 647.
(4) 22 Ch. D. 816.
(5) 24 Q. B. D. 640.

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the domicil of the debtor. This Court cannot go behind the order of the Scottish Court, under which the curator claims to appear on behalf of the debtor and dispute the petitioners' debt.

[STIRLING L.J. Can two persons appear for the lunatic debtor under s. 148 ?]

The section is wide enough to enable the Court to see that the debtor is fully represented upon a hostile petition, and that an order is not made upon a debt that is not properly proved. Therefore, it is submitted that the registrar was right in allowing the curator to appear in order to shew that there was no proper petitioning creditor's debt. It cannot be desirable that this debt should be allowed to pass undisputed and without full inquiry.

RIGBY L.J. The point in this case is a very narrow one, and depends solely upon the construction of s. 148 of the Bankruptcy Act, 1883, which says that, for the purposes of the Act, "a lunatic may act by his committee or curator bonis." Now, that does not mean that the lunatic may act either by his committee or by his curator bonis, as a matter of choice. It means, according to my view of the section, that he may act by his committee, if the lunacy is an English lunacy and a committee has been appointed, and in the same manner, probably, in Ireland; and he may act by a curator bonis if, there being no committee in England and there being a curator bonis, it is necessary that the bankrupt lunatic should do some act under the Bankruptcy Act. I consider there is no authority whatever for the contention that a curator bonis in Scotland is entitled to intervene in English bankruptcy proceedings and, in the presence of the committee through whom in England the lunatic acts, to claim a locus standi to argue any question arising in the bankruptcy proceedings, either as to the validity of the petitioning creditor's debt or upon any other point.

I would only add this, that the Court in Lunacy made an order which entitled, and, indeed, obliged, the committee to commit an act of bankruptcy on behalf of the lunatic by filing

a declaration of insolvency in the name of the lunatic, and, if necessary, to present a petition. That order was not made by us sitting as a Court of Appeal in bankruptcy, but was made by us merely as three persons named under the sign-manual of the Sovereign to deal with matters concerning lunatics; and in that way, and in that way only, it was that the matter upon which that order was made came before us. We must, therefore, not be understood for a moment to say that the committee can quote our authority, as if we had been sitting as a Court of Appeal, for his agreeing to the petitioning creditors' debt, if any question should be raised as to the validity of the debt; and although we now decide that the curator bonis has no locus standi to appear on the petition, we do not say that the committee can, without obtaining any directions at all from a Master in Lunacy, undertake to admit the petitioning creditors' debt. If, therefore, these proceedings are to go on, the committee must apply to the Master in Lunacy by a summons for directions. The only point we now actually decide is that the curator bonis has no locus standi, and therefore the appeal must be allowed.

Vaughan Williams L.J. I agree. I wish to preface what I have to say by pointing out that the order made in Scotland appointing the curator bonis shews the reason why it was made; and one gathers from that, that the order was not made on the ground of the lunacy or general mental incompetency of the person applying for the order.

Therefore, the observations I am about to make must be understood as being made in view of the particular form of that order.

I entirely agree that where there is a lunacy in England and in England only, and a committee has been appointed under English jurisdiction, s. 148 clearly means that the committee in England shall alone be at liberty to act on behalf of the lunatic in bankruptcy proceedings, and that it does not mean that the curator bonis in Scotland, when appointed as this one has been, shall have any locus standi at all. The only officer who is entitled to represent the lunatic here, under s. 148, is

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Vaughan Williams L.J.

the committee. But, in my opinion, speaking for myself, the steps taken towards bankruptcy in the case of a lunatic ought to be taken with the greatest caution, and everything that a committee does ought to be done under the express sanction of the Lunacy jurisdiction. Here, sitting as a Court in Lunacy, we sanctioned the filing of a direction of inability to pay debts. We also sanctioned the filing of a petition, that is to say, a petition in the name of the lunatic debtor. We sanctioned nothing else; and under those circumstances, in my judgment, it would have been altogether improper for the committee to consent to an adjudication in bankruptcy without first obtaining the sanction of the Lunacy jurisdiction. I therefore think that the committee should obtain a proper authority to consent to an adjudication, and when he applies for that authority, if he has any reason to suppose that the petitioning creditors' debt can be properly disputed on the facts, it will be his duty to bring such facts before the Lunacy jurisdiction when he applies for the leave to consent. I take it for granted that before he consents in this particular case he will take that course.

Stirling L.J. I also agree. It is quite clear upon the rules made under the Judicature Acts that if an action were brought against the lunatic in England, the proper person to defend that action on his behalf would be the committee. So, if a petition is presented against him in bankruptcy in England, then according to the Bankruptcy Act the proper person to appear on behalf of the lunatic, and to do what is necessary on his behalf upon that petition, is the committee. I quite agree also that the committee must, in dealing with the petition when it has been presented, act in conformity with the rules of the Lunacy jurisdiction, and must obtain proper sanction and authority for the steps he thinks it necessary to take in the matter.

Rigby L.J. The appeal will be allowed with costs both here and below against the curator personally. The costs will

include those of the committee, who properly represents the lunatic on this appeal.

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Appeal allowed.

Solicitors: *E. C. Kilsby & Son; E. Kimber; Hepburn, Son & Cutcliffe.*

G. I. F. C.

In re BETTS. *Ex parte* OFFICIAL RECEIVER.

1901 *March* 25.

Bankruptcy—Receiving Order—Jurisdiction to Rescind—Abuse of Process of Court.

A debtor, with the intention of evading committal orders made against him upon judgment summonses, presented his own bankruptcy petition, upon which a receiving order was made. He had previously at short intervals and with the same object presented two other bankruptcy petitions upon which receiving orders had been made, and was an undischarged bankrupt under three bankruptcies:—

Held, that the presentation of the petition by the debtor under such circumstances was an abuse of the process of the Court, and that the receiving order founded upon it must be rescinded.

Ex parte Painter, In re Painter, [1895] 1 Q. B. 85, distinguished.

APPEAL against the refusal of the registrar of the Brighton County Court to rescind a receiving order made against the debtor on his own petition.

It appeared that prior to 1891 the debtor had been in receipt of an income of 1100*l.* a year under a marriage settlement. In that year he was made bankrupt upon a creditor's petition; his estate paid 3*s.* in the pound, but the debtor never obtained his discharge. As a result of the bankruptcy, the income under the marriage settlement had since that date been paid by the trustees to the debtor's wife. In 1896 a receiving order was made against him on a creditor's petition, but it was rescinded by the Court of Appeal on the debtor's application, upon the ground that there were no assets that would be available, and that the proceedings could only result in a waste of money. (1) In 1897, a committal order having been made against him, a

(1) See *In re Betts, Ex parte Betts*, [1897] 1 Q. B. 50.

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receiving order was made against the debtor on his own petition: there were no assets, and the debtor never obtained his discharge under this bankruptcy. In January, 1900, further committal orders having been made against him, the debtor presented another petition in bankruptcy, upon which a receiving order was made; there were no assets, nor did the debtor obtain his discharge. In September, 1900, two more committal orders having been made, the debtor presented a further petition, upon which the present receiving order was made. The official receiver applied to have the receiving order rescinded, upon the ground that the presentation of the petition by the debtor was an abuse of the process of the Court, and that it had been presented solely with the view of avoiding imprisonment under the committal orders. The registrar, being of opinion that he was bound by the decision in *Ex parte Painter, In re Painter* (1), refused the application without costs.

The official receiver appealed.

Muir Mackenzie, for the official receiver. There is clear jurisdiction to rescind a receiving order if the bankruptcy petition is not a proper petition: *In re Bond.* (2) In *Ex parte Painter, In re Painter* (1), Vaughan Williams J., while holding that the Court had power to rescind the receiving order, thought that it was not a case in which the power ought to be exercised; that case is, however, widely different in its circumstances to the present, for there the debtor had never previously been bankrupt. Here the circumstances shew a deliberate practice of presenting one bankruptcy petition after another with the object of defeating creditors, under circumstances which amount to an abuse of the process of the Court. There is a slight analogy to the present case in the practice under the Bankruptcy Act, 1869, under which it was held that a debtor could not present a second petition in liquidation unless the conditions imposed on the hearing of a prior petition were complied with. [He was stopped by the Court.]

The debtor in person.

(1) [1895] 1 Q. B. 85. (2) (1888) 21 Q. B. D. 17.

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WRIGHT J. I am of opinion that this appeal should be allowed. As to the law there is no doubt. It has been established in *Ex parte Painter, In re Painter* (1), that where a debtor files his own petition the proceedings in bankruptcy ought not to be stopped merely on the ground that his object in filing the petition is to escape the effect of an order against him under the Debtors Act; I do not wish to criticise a word that was said in that case. There must, however, be a limit to a debtor's immunity; and if it appears as a fact that a debtor is in the habit of filing bankruptcy petitions, so that the bankruptcy law is really being made use of in order to assist him in his frauds on his creditors, and to enable him to get credit, while he all along has the intention of getting rid of his liabilities by filing his own petition, I cannot think that such a state of things comes within the protection of the bankruptcy law. That is the finding of fact in the present case. I express no opinion as to whether the respondent ought or ought not to be proceeded against under the Debtors Act. There are abundant grounds for rescinding the receiving order, and, in my opinion, the registrar was wrong in refusing to rescind it.

DARLING J. I am of the same opinion. It seems to have been found as a fact that the bankrupt adopted the device of filing his petition in bankruptcy as part of a scheme or system by which he was enabled to become what I may call a professional bankrupt, and, if the receiving order is not set aside, the bankrupt will be permitted by his own action to reduce the committal orders made against him to an absolute nullity; to permit him to do so would be merely another way of saying that an application for a committal order in such a case would be a mere farce. I think that this petition was nothing short of an obvious abuse of the process of the Court, and the receiving order must be rescinded.

Appeal allowed.

Solicitor for appellant: *Solicitor to the Board of Trade.*

(1) [1895] 1 Q. B. 85.

W. J. B.

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March 14.

[IN THE COURT OF APPEAL.]

DREDGE AND ANOTHER *v.* CONWAY, JONES & CO.

Employer and Workman—Compensation—Construction or Repair of Building—Whitewashing—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

A workman employed in whitewashing a ceiling, in a house exceeding thirty feet in height, fell from a scaffolding on which he was standing, and was killed. In an action by his widow to recover compensation:—

Held, that the employment of the deceased was in a building which was being repaired within the meaning of s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897, and that the applicant was entitled to an award.

Since the decision of the House of Lords in *Hoddinott* v. *Newton, Chambers & Co.*, [1901] A. C. 49, the decision of the Court of Appeal in *Wood* v. *Walsh & Sons*, [1899] 1 Q. B. 1009, is no longer law.

APPEAL from an award of a county court judge under the Workmen's Compensation Act, 1897.

The applicants were the widow and son of a deceased workman, the son being added as executor of his father's will. The deceased was employed in a house exceeding thirty feet in height, and at the top of the staircase there was a structure which the county court judge found to be a scaffolding. On this the deceased was standing in order to whitewash the ceiling of the staircase, and while so employed he fell and was killed. The work that was to be done to the building was partly of the nature of distempering walls, cleaning and painting woodwork and walls, and whitewashing ceilings, and partly work that was admittedly structural repair, such as repairs to fireplaces, for which no scaffolding would be required, and other structural repairs which had not been commenced at the time of the accident. The county court judge held, on the authority of *Wood* v. *Walsh* (1), that the whitewashing was not repairing within the Act, and that it was not sufficient to shew that a scaffolding was erected in one part of the building

(1) [1899] 1 Q. B. 1009.

for a purpose not within the Act, and that structural repairs were going on in another part of the building without a scaffolding. He therefore refused to make an award in favour of the applicants, but, in view of an appeal, assessed the amount to which the applicants would be entitled if his judgment should be reversed.

The applicants appealed.

Ruegg, K.C., and *Morton Brown*, for the applicants. Even on the assumption that painting is not a structural repair, all that was being done to this building was under one contract, which undoubtedly included structural repairs. The contract cannot be split up into two parts, and the case was therefore that of a building of the requisite height and being repaired by means of a scaffolding. But since the decision of the case in the county court, the House of Lords in *Hoddinott* v. *Newton* (1) has decided, as Lord Macnaghten expresses it, that construction, repair, and demolition cover every phase in the life of a building. Painting and whitewashing are certainly phases in the life of a building, and *Wood* v. *Walsh* (2) must be taken to have been overruled.

Arthur Powell, for the employers. The words of s. 7 of the Act refer to employment about a building which "is being repaired" by means of a scaffolding, and no work coming within that description was being done at the time of the accident, unless whitewashing is repairing. The question, therefore, is whether *Wood* v. *Walsh* (2) has been overruled by *Hoddinott* v. *Newton*. (1) The latter case does not decide that everything done to a building must be construction, repair, or demolition, for that would include mere ornamentation. The House of Lords had to decide whether a particular work done to a completed building was construction or repair. The work was a structural alteration, and the point under consideration was whether the fact that the building had been completed prevented the new work from being construction or repair. This judgment of the House of Lords, read by this light, does not affect the decision of this Court in *Wood* v. *Walsh* (2) that

(1) [1901] A. C. 49. (2) [1899] 1 Q. B. 1009.

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painting could not properly be treated as repair; and if painting is not repair neither is whitewashing, and the decision of the county court judge should be supported.

A. L. SMITH M.R. This was an application for an award under the Workmen's Compensation Act, 1897, in which the county court judge held that the masters were not liable, but in the alternative assessed the amount of compensation.

The circumstances under which the claim arose were that there was an estimate with regard to the work to be done in the house in which the deceased was working. Among the things to be done to the house were scraping and whitening or distempering ceilings, brushing down and distempering walls, cleaning and touching up with paint certain woodwork and portions of walls, painting certain chimneypieces, windows, sashes and balusters, cleaning roof timbers, repairing curbs and hearths of fireplaces, rehanging a door, and some other small matters. Besides this work provided for in the estimate, there was certain additional work of a similar description, and also repairs to spouting and roof. The first question that arises is, Was that a contract to do repairs to a building? There was for the purpose of the work what is now admitted to have been a scaffold, and on this the workman was standing for the purpose of whitewashing the ceiling of the staircase. It is found as a fact by the county court judge that, so far as regards what would be admitted on both sides to be structural repair, that work had not been commenced at the time of the accident. I do not think that fact makes any difference, for all the work to be done on the building was part of one contract. If this case had come on before the judgment of the House of Lords in *Hoddinott* v. *Newton* (1), the case would have been governed by the decision of this Court in *Wood* v. *Walsh* (2), in which it was decided that painting, not being a matter relating to the structure of a house, was not a repair such as was contemplated by the Act. In *Hoddinott* v. *Newton* (1) the question involved arose under these circumstances. A stable had been built and completed, and being new it did not require any repairs, but the

(1) [1901] A. C. 49. (2) [1899] 1 Q. B. 1009.

roof wanted stiffening by means of stays or girders, and a man was injured while putting them in. In this Court the question arose whether this work was construction or repair of a building, and we held that it was not. The House of Lords by a majority decided that our construction of the statute was wrong. I take the considered judgment of Lord Macnaghten, who presided, and I find at p. 53 of the report the following passage: "The question, as it seems to me, is this: Was the work—the thing that was actually being done—a work of construction or a work of repair, or something which was neither the one nor the other, neither construction nor repair? It seems a strong thing to say that when a building is once completed according to the original design you cannot have anything further in the way of construction unless the work be of such a character as to make the building practically a new building. That, however, was the argument. But the Act, it will be observed, uses the word 'construction,' not the word 'erection.' It speaks of a building 'being constructed,' not of a building 'being erected.' And it couples 'construction' with 'repair.' Now 'repair,' as the word is commonly understood, is repair whether much is done or little. Repair for the most part is occasional and partial." The learned Lord does not adopt the rule laid down by this Court that repair must be structural, and he sums up the matter at a later period in his judgment in these words: "Construction, repair, demolition—these operations cover, I think, every varying phase in the life of a building from its beginning to its end." On a fair reading of this judgment, it seems to me that the limitation put on the words of the statute by this Court is not adopted, and that we cannot now say that painting does not come within the term "repair." It follows, therefore, that the decision of this Court in *Wood* v. *Walsh* (1) is no longer law. Turning to Lord Morris' judgment he says: "When you realize what the entity called the building is, all operations on it must be either constructing, or repairing, or demolishing. . . . . There is no room for any third operation of so-called alteration, as distinct from constructing or repairing." That view seems to me to cover and include painting. Lord

(1) [1899] 1 Q. B. 1009.

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Davey expressed his agreement with Lord Macnaghten, that is, with the whole of the learned Lord's judgment. Lord Brampton concurred in the view taken by the majority of the learned Lords. The conclusion to be arrived at is that painting, as one of the operations to which a building is exposed, comes under the head of repair, and, if painting does so, then equally whitewashing. As regards one thing I should, for my part, make an exception, and that is that I should not be disposed to consider that the doing of ornamental work was repairing within the meaning of the Act. I think for the reasons I have given this appeal should be allowed.

COLLINS L.J. I am of the same opinion. Since the decision of the House of Lords in *Hoddinott* v. *Newton* (1), it seems to me that it is impossible to say that in this particular case the building was not being repaired. There was a scaffolding, the building was thirty feet high, and therefore all the conditions imposed by the Act were met. Lord Macnaghten laid down a broad principle as the governing principle on which the Act should be construed, and that principle was assented to by the majority of their Lordships. I think that conclusion was arrived at by eliminating certain general considerations, derived from the surrounding circumstances, which governed this Court in arriving at their decision and which seemed to indicate the class of work to which the Act was directed. Those considerations suggested work which was more than a mere trivial operation carried on in one part of a room of the building and unconnected in any way with the height of the building. Looking at the judgment of the House of Lords, all those considerations must be eliminated as throwing no light in determining what cases come within the statute. We have, therefore, to approach each case without attempting to impose any limitation such as might appear to arise from the context and the other provisions of the Act; and from this point of view I think it is impossible to say that the whitewashing in this case was not a repair within the meaning of the Act. The other conditions which were necessary to

(1) [1901] A. C. 49.

bring the case within the Act admittedly exist, and the appeal must therefore be allowed.

ROMER L.J. I agree that the appeal must be allowed. On the facts of the case the building was being repaired by scaffolding and was thirty feet high. The work that was being done was of a substantial character, and was required for the protection and maintenance of the building. The case, therefore, comes within the principle laid down by the House of Lords, and what was being done amounted to repairing within the meaning of the statute. I wish, however, to guard myself from being supposed to decide that every unimportant piece of work that is done on a building is necessarily within the statute because some small trestle or insignificant support is used in doing the work.

Appeal allowed.

Solicitor for applicants: *C. T. Courtney Lewis, for W. Langley-Smith, Gloucester.*

Solicitors for respondents: *William Hurd & Son, for F. Treasure, Gloucester.*

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March 12, 26.

[IN THE COURT OF APPEAL.]

WHITEHEAD *v.* READER.

Employer and Workman—Compensation—Accident arising out of and in the Course of the Employment—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1.

A workman was employed as a carpenter, and part of his duty was to sharpen his tools on a grindstone rotated by machinery. He had received orders not to touch the machinery. The band that rotated the grindstone having slipped he endeavoured to replace it, and in doing so was injured. On a claim for compensation under the Workmen's Compensation Act, 1897, the county court judge found that the accident arose out of and in the course of the employment of the workman, and negatived serious and wilful misconduct on his part, and made an award in his favour. On appeal:—

Held, that the disobedience of the master's order did not of itself prevent the act of the workman from being an act done in the course of his employment, and that as it had not been shewn that the replacing of the band was an act on the part of the workman so remote from his ordinary duties that it could not fairly be said to be one arising out of and in the course of his employment, the award must stand.

Lowe v. *Pearson*, [1899] 1 Q. B. 261, distinguished.

APPEAL from an award of a county court judge under the Workmen's Compensation Act, 1897.

The applicant was a carpenter, and a part of his duty was to sharpen his tools at a grindstone rotated by machinery. He had been forbidden to touch the machinery, but the band that rotated the grindstone came off, and he endeavoured to replace it. In doing so he sustained an injury to his hand for which he sought to obtain compensation. The county court judge found that the accident that caused the injury arose out of and in the course of the employment of the workman, that he had been forbidden to touch the machinery, but that he had not been guilty of serious and wilful misconduct in endeavouring to replace the band. An award was made in favour of the applicant, and the employer appealed.

March 12. *T. Willes Chitty*, for the employer. The workman was acting contrary to the orders of his employer in

interfering with the machinery, and when a man does that which he is expressly told not to do it would be a contradiction in terms to say that his act was done in the course of his employment. *Lowe* v. *Pearson* (1) is in point, and there was no evidence of an emergency to bring the case within *Rees* v. *Thomas*. (2)

Montague Lush, for the applicant. There is no ground for disturbing the judgment. In *Lowe* v. *Pearson* (1) the whole point was that the boy chose, in his idle time, to do something that had no connection with his employment. Here the man's employment required that he should sharpen his tools on the grindstone, and if it stopped he could no longer work. It cannot, therefore, be said that there was no evidence that the accident arose in the course of the employment. Such an act as that done by the workman in this case would be within the scope of his employment unless there were serious and wilful misconduct on his part, and that has been negatived by the county court judge. It is for the other side to shew that the judge has gone wrong; and if the notes shew a state of facts consistent with his having decided rightly, the award should not be disturbed. [He cited *McNicholas* v. *Dawson*. (3)]

T. Willes Chitty, in reply. In *McNicholas* v. *Dawson* (3) the man injured was going in the course of his employment from one place to another, and at the most he chose a wrong way of doing something which came within his employment.

Cur. adv. vult.

March 26. A. L. SMITH M.R. This is an appeal by a master in proceedings taken by a workman to assess compensation under the Workmen's Compensation Act, 1897. The learned county court judge has awarded the applicant 12*s*. 6*d*. a week, and the master appeals upon the ground that the injury was not caused by an accident arising out of and in the course of the man's employment. That is the only point.

(1) [1899] 1 Q. B. 261. (2) [1899] 1 Q. B. 1015.
(3) [1899] 1 Q. B. 773.

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From the judge's notes, which are a résumé of the case and not notes of the evidence of individual witnesses, which we have been unable to get, these appear to be the facts. The workman was employed in a factory within the meaning of the Act, and as part of his employment he had to grind his tools at a grindstone which was being rotated by a band driven by steam power. Whilst he was so employed the band slipped off and the man endeavoured to adjust it, and whilst so doing he was injured. That the injury primâ facie arose out of and in the course of his employment is to me clear, but the man had been told not to touch the machinery, and it is said that this shews that the injury was not the result of an accident arising out of and in the course of his employment. Does disobedience to this order cause the man not to have been injured in the course of his employment? I think not. It cannot be said that every disobedience of an order terminates a man's employment. Disobedience may or may not give a defence to a master under the clause relating to serious and wilful misconduct. The learned county court judge was right in holding that the case of *Lowe* v. *Pearson* (1) has no application to the present case. That was not a case of employment on machinery. The master employed a boy in manual labour, and he was to make clay into balls, and his only duty when he had done this was to take them to a woman who was working a machine. The boy had been told not to touch the machine. He, however, went outside his employment and attempted to clean the machine, and in doing so disobeyed the express orders of the master. The Court held, and I think quite rightly, that the boy had not sustained the injury in the course of his employment. In the present case the workman in the course of his employment had to grind the tools he used at the grindstone. It is true that he had been told not to touch the machinery, but still he was acting in the course of his employment when, in trying to adjust the band after it came off, he came by his injury. In my opinion, the county court judge was right in coming to a conclusion in favour of the workman, and the appeal must be dismissed.

(1) [1899] 1 Q. B. 261.

COLLINS L.J. I have come to the same conclusion, though I have had some hesitation in doing so, because of the difficulty of arriving at a clear opinion as to what it is that the county court judge has found in fact. I was at first disposed to think that he had found that the orders of the master had confined the employment of the workman to the ordinary work of a carpenter, and the comparatively unskilled work of sharpening his tools, excluding from the employment any interference with the machinery which actuated the grindstone at which part of the work was done. On looking at the judge's notes as a whole, and bearing in mind, as the Master of the Rolls has pointed out, that they are not a detailed statement of the evidence, but are only a short résumé of the facts, it appears to me that it is not possible to say that the county court judge has found as a fact that there were two spheres of employment, separated by the master's orders—one that of doing joiners' work, and as incidental to that the right to sharpen tools at the grindstone, and the other that of managing the machinery. I agree in what has already been pointed out, that it is not every breach of a master's orders that would have the effect of terminating the servant's employment so as to excuse the master from the consequences of the breach of his orders. We have to get back to the orders emanating from the master to see what is the sphere of employment of the workman, and it must be competent to the master to limit that sphere. If the servant acting within the sphere of his employment violates the order of his master, the latter is responsible. It is, however, obvious that a workman cannot travel out of the sphere of his employment without the order of his employer to do so; and if he does travel out of the sphere of his employment without such an order, his acts do not make the master liable either to the workman under the Workmen's Compensation Act, 1897, or to third persons at common law. Take as an illustration the case of *Beard* v. *London General Omnibus Co.* (1), in which the conductor of an omnibus took upon himself to drive it in breach of his master's orders, because his employment was limited by the master to acting as conductor, and it was not shewn that he

(1) [1900] 2 Q. B. 530.

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Collins L.J.

had authority to drive, an employment for which he might have been quite unfitted. In the present case, if the two spheres of employment had been distinctly separated and defined—namely, the grinding of the tools and the skilled labour of managing the machinery—and the applicant's employment had been limited to the former, and if, while acting in breach of the order limiting his employment, he had met with the accident, the master would not have been liable. The county court judge came to the conclusion that the injury to the workman arose from an accident in the course of the employment, and he coupled that with a finding as to that which the man did not being serious and wilful misconduct, which does not shew that the workman had travelled out of the sphere of his employment in doing that which resulted in the injury to him. The county court judge has not furnished to this Court materials upon which we can say that he was wrong in law, and therefore this Court is not in a position to differ from the conclusion at which he arrived.

ROMER L.J. read the following judgment:—I also think that we ought not to differ from the county court judge in this case. He appears to have found that the accident arose out of and in the course of the workman's employment, and that in disregarding the master's orders not to touch the machinery he was not guilty of serious and wilful misconduct. The evidence taken in the county court is not before us, and the appellant is not able to furnish us with any notes of the evidence. That being so, we have to depend upon the meagre notes of some findings supplied by the judge. From these it does not appear that the decision of the judge cannot be or ought not to be supported. At the time of the accident the workman was employed on his master's business. He was not idling or doing something which was clearly beyond the scope of his employment. To make the grindstone work, and so to be able to sharpen his tools, the carpenter may well be said to have been about his master's business when he tried to replace the band, and that on the impulse of the moment he should have forgotten the order as to not touching the machinery is not unnatural,

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and may well be regarded as a venial act and not as being wilful misconduct on his part. I am not able to gather from the facts of the case that the replacing of the band was an act on the workman's part so remote from his ordinary duties that it could not be fairly said to be one arising out of and in the course of his employment. It is not the case of a workman, whose duties in no way bring him into contact with his master's machinery, officiously or for his own purposes meddling with that machinery contrary to orders, and so being injured. The principle upon which cases like *Lowe* v. *Pearson* (1) were decided has no application to the present case.

Appeal dismissed.

Solicitors for applicant: *Maddocks & Colson, for H. Maddocks, Coventry.*

Solicitors for respondent: *Sharpe, Parker & Co., for Hughes & Masser, Coventry.*

A. M.

[IN THE COURT OF APPEAL.]

C. A. 1901 *Feb.* 28.

LEVITT AND ANOTHER *v.* HAMBLET.

Stock Exchange—Principal and Agent—Default of Broker—Liability of Client to Jobber—Privity of Contract.

The defendant employed a broker to purchase for him certain shares on the Stock Exchange, and afterwards directed him to carry over the shares to the next account. The broker, in accordance with the regulations of the Stock Exchange, purchased the shares in his own name from the plaintiffs, who were jobbers on the Stock Exchange, and afterwards carried over with them the same shares. The defendant's name was not disclosed. Before the next settling day the broker was declared a defaulter on the Stock Exchange, and in accordance with the rules of that body his contract with the plaintiffs was closed at a price fixed by the official assignee of the Stock Exchange. The plaintiffs having ascertained that the broker was acting for the defendant in this transaction called upon him to take up the shares. He declined to accept any responsibility for them; and the plaintiffs, on the settling day, tendered the shares to the defendant, and, on his refusing to accept them, sold them for the best price then obtainable. In an action to recover from the defendant the difference

(1) [1899] 1 Q. B. 261.

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between the price at which the shares had been carried over and that at which they had been sold:—

Held, affirming the judgment of Mathew J., that the defendant was liable as principal on the contract made for him by his broker with the plaintiffs, and that the privity of contract between the plaintiffs and the defendant was not affected by the rules of the Stock Exchange as to the compulsory closing of the transactions of a defaulting broker.

There is no established usage under which the client of a broker on the Stock Exchange who has become a defaulter, and whose transactions have been closed at prices fixed by the official assignee, can claim the right to close at the price so fixed a transaction entered into for him by the broker with another member of the Stock Exchange.

APPEAL from a judgment of Mathew J. in favour of the plaintiffs on the trial of the action without a jury.

The plaintiffs were stock and share brokers and members of the Stock Exchange, and the defendant was an outside stock and share dealer. The action was brought to recover a balance claimed to be due to the plaintiffs in respect of 300 Southern Preference Shares sold by them to the defendant, and for moneys payable by the defendant for agreed contangoes. The defendant instructed Messrs. Edward Preston & Co., who were stockbrokers and members of the Stock Exchange, to purchase a number of the above-named shares, and they contracted with the plaintiffs for the purchase of 300 of the number required by the defendant. The sale was for the mid-December, 1899, account, December 12, and the defendant instructed Edward Preston & Co. to carry over the shares to the end-December account, December 29. They accordingly carried over the shares with the plaintiffs at the price of 57, and agreed to pay 11*l.* 18*s.* 11*d.* as contango for the postponement of delivery of the shares. Before the end-December settling day Edward Preston & Co. were declared to be defaulters, and in accordance with rule 177 of the Stock Exchange Rules the price current of the shares in the market was fixed by the official assignee, the price fixed being 57. (1) The plaintiffs then ascertained from Edward

(1) Rule 177: "In every case of failure the official assignee shall publicly fix the prices current in the market immediately before the declaration, at which prices all persons having accounts open with the defaulter shall close their transactions by buying of or selling to him such stock, shares, or other securities as he may have contracted to take or deliver, the differences arising from the defaulter's transactions being paid to or

Preston & Co. that the defendant was their client, and communicated with the defendant, who insisted that the account had been closed under rule 177, and that the matter was at an end. The plaintiffs subsequently gave the defendant notice that they would look to him to pay for the shares on December 29, and on that day they tendered the shares to him, and on his refusal to accept the shares they were sold at $54\frac{5}{8}$. The difference between this price and the price at which the shares were carried over, together with the carrying-over rate, amounted to 154*l.* 8*s.* 11*d.*, which sum the plaintiffs claimed in the action.

At the trial Dr. Richardson, the official assignee of the Stock Exchange, was called as a witness, and gave evidence that there is no usage on the Stock Exchange which entitles the client, when the broker is declared a defaulter, to insist upon closing the transaction at what is called the hammer price—that is, at the price fixed by the official assignee. The learned judge in giving judgment pointed out that this evidence was distinct and had not been challenged, and referred to *Anderson & Co.* v. *Beard* (1) as a case in which no such evidence was given, but it had been assumed that there was an option in the client, after the broker had been declared a defaulter, to close at the hammer price. He decided that the plaintiffs had not offered any option to close at the hammer price, but that the position taken up by the defendant was that the account was closed. The learned judge continued: "It seems to me to follow from what has been already decided (2), unless there is some difficulty created in this particular case, that there is privity between the jobber and the client. The jobber is entitled to have the transaction carried out as if he had made the bargain himself with the client. It is said that rule 177 precludes the possibility of any such conclusion. I do not think so. For the reasons which have been given before, that rule appears to be a domestic rule laid down between the

claimed from the official assignee. In the event of a dispute as to the prices named, they shall be fixed by two members of the committee."

(1) [1900] 2 Q. B. 260.

(2) *Beckhuson* v. *Hamblet*, [1900] 2 Q. B. 18; *Anderson & Co.* v. *Beard*, [1900] 2 Q. B. 260.

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broker and the jobber on the Stock Exchange, and not to be intended to affect the public in any way." The learned judge then decided on the facts that the shares bought by the brokers for the defendant had not been so dealt with as to destroy the privity of contract between the plaintiffs and the defendant as to the 300 now in question. The facts as to this point sufficiently appear in the judgment of Collins L.J. Judgment was given for the plaintiffs for the amount claimed.

The defendant appealed.

Morten (*Herbert Reed*, *K.C.*, with him), for the defendant. There is no privity of contract between the jobber and the client of the broker with whom the jobber contracts. Credit is given to the broker and not to his client, who is not recognised in the transaction. This appears by rule 53: "The Stock Exchange does not recognise in its dealings any other parties than its own members. Every bargain, therefore, whether for account of the member effecting it, or for account of a principal, must be fulfilled according to the rules, regulations, and usages of the Stock Exchange." This view is confirmed by rule 54, which is: "No member shall attempt to enforce by law a claim arising out of Stock Exchange transactions against a member or defaulter, or against the principal of a member or defaulter, without the consent of such member, of the creditors of the defaulter, or of the committee. The committee have power to intervene in cases where the principal of a member shall attempt to enforce by law a claim which is not in accordance with the rules, regulations, and usages of the Stock Exchange, and will deal with such cases as the circumstances may require." If, however, the defendant was in the position of an undisclosed principal, the right of the plaintiffs to sue him is subject to the rules and regulations, and rule 177 must be read into the contract between the parties. That rule shews that the transaction was closed on the default of the broker. *Hartas* v. *Ribbons* (1) shews that this is the case, and that the transaction can only be kept open at the option of the client. In *Duncan* v. *Hill* (2) the broker

(1) (1889) 22 Q. B. D. 254. (2) (1873) L. R. 8 Ex. 242.

was held to be entitled only to recover the differences on the last account day, and that decision is inconsistent with the suggested right of the jobber in this case to claim the differences on the day to which the shares were carried over. There is only one contract, and what that is is determined by the relations between the broker and the jobber. If the transaction between them is closed, it is so for all purposes. Another objection to the right of the plaintiffs to recover is that, by the usage of the Stock Exchange, on the default of a broker his client has three courses open to him. He can either deal directly with the jobber or employ another broker, or he has the option to close the transaction at the price fixed by the official assignee. The evidence stated on page 674 of the report of *Ex parte Grant, In re Plumbly* (1) shews that the client had an option to continue with the jobber, and, if so, the contract must be at an end if he does not exercise that option. In *Beckhusen* v. *Hamblet* (2) and *Anderson & Co.* v. *Beard* (3) the three courses open to the client are treated as his right under the practice of the Stock Exchange, and one of these is to close the transaction. The position that the defendant took up was that the transaction was closed, and that was in fact an exercise of the option so to treat it. The evidence in this case, contradictory of this usage of the Stock Exchange, as to which evidence has been given in many cases besides those cited, was given by the official assignee, and the other witnesses were not questioned as to the matter. The duty of the official assignee is to adjust the accounts on the Stock Exchange of the defaulting broker, and he has nothing to do with the carrying out of contracts between principal and jobber. The evidence shews an order to the brokers to purchase more than 300 shares. This order could not be split up: *Mollett* v. *Robinson*. (4) In that case Lord Chelmsford pointed out that the mere intention to appropriate cannot possibly establish a privity. The defendant did not authorize any new contract, and the carrying over of 300 only of the shares

(1) (1880) 13 Ch. D. 667.
(2) [1900] 2 Q. B. 18.
(3) [1900] 2 Q. B. 260.
(4) (1870) L. R. 5 C. P. 646; (1872) L. R. 7 C. P. 84; (1875) L. R. 7 H. L. 802.

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did not create any privity between the plaintiffs and the defendant. In *Mortimer* v. *M'Callan* (1) and *Nickalls* v. *Merry* (2) there had been an actual purchase by and sale to the customer.

Rufus Isaacs, K.C., and *McIntyre*, for the plaintiffs. Apart from the rules of the Stock Exchange, there would certainly be privity of contract between the plaintiffs and the defendant. The decision in *Nickalls* v. *Merry* (2) clearly shews that the effect of the contract made by the broker is to establish privity of contract between the broker's client and the jobber. The House of Lords could not have decided as they did in that case except on that footing: see also *Grissell* v. *Bristowe* (3); *Maxted* v. *Paine* (4); *Beckhuson & Gibbs* v. *Hamblet* (5); *Anderson & Co.* v. *Beard.* (6) Rules 53 and 54 are domestic regulations of the Stock Exchange of which the client cannot avail himself, and do not shew that there is no contract between the client and the jobber. Rule 177 is also only a domestic regulation of the Stock Exchange by which provision is made for the liquidation of the defaulting member's accounts as between himself and other members of the Stock Exchange, and has nothing to do with the rights or liabilities of outsiders: see *Ex parte Grant, In re Plumbly* (7); *Tomkins* v. *Saffery* (8); *Richardson* v. *Stormont, Todd & Co.* (9) This rule has no effect on the position of the broker's undisclosed principal. This question is really concluded by *Nickalls* v. *Merry* (2), for it is inconsistent with the view that there is privity between the client and the jobber that the operation of rule 177 should put an end to the contract between them. Rule 177 is only an automatic method of adjusting the broker's affairs as between himself and those members of the Stock Exchange with whom he has outstanding bargains. The words "subject to the rules and regulations of the Stock Exchange" in the contract mean subject to such of the rules and regulations of the Stock Exchange as are in their nature applicable to outsiders, such as the fixing of the settling days, and do not import into the

(1) (1840) 6 M. & W. 58.
(2) (1875) L. R. 7 H. L. 530.
(3) (1868) L. R. 4 C. P. 36.
(4) (1871) L. R. 6 Ex. 132.
(5) [1900] 2 Q. B. 18.
(6) [1900] 2 Q. B. 260.
(7) 13 Ch. D. 667.
(8) (1877) 3 App. Cas. 213.
(9) [1900] 1 Q. B. 701.

contract the domestic rules of the Stock Exchange only applicable to members inter se. There is no case which establishes any such usage as that set up by the defendant enabling the client to claim the benefit of the artificial closing of the broker's accounts under rule 177.

Whatever may have been assumed to be the practice of the Stock Exchange as to the option of the client to close the transaction at the price fixed by the official assignee, the evidence in the present case was uncontradicted, and there is a distinct finding by the learned judge that the client has no such right. On the question whether the dealing with the shares prevented privity of contract from arising with respect to the 300 now in question, the learned judge was right in looking at the transaction as it stood after the mid-December account day, and the evidence shewed an appropriation of one lot of 300 to be carried over. As to this lot a new contract arose, and that is the contract in respect of which this action is brought.

Morten, in reply.

A. L. SMITH M.R. This is an appeal from a judgment of my brother Mathew, before whom the point involved has come twice, and whose decision is in consonance with a dictum of my brother Kennedy and a judgment of my brother Bigham in similar cases. The action is by a firm of jobbers against the client of a firm of brokers who bought shares from the plaintiffs. The defendant employed the brokers to purchase the shares, and the brokers contracted with the plaintiffs, and at the request of the defendant the shares were carried over, and if nothing had intervened the brokers, Edward Preston & Co., would have had to take up and pay for the shares at the price of 57 on the settling day, December 29, 1899, and the defendant would have had to pay the brokers. Before that time, and while the shares were being carried over, the brokers with whom the defendant dealt became defaulters, and were hammered. When the settling day arrived the plaintiffs, who had found out that the defendant was the principal in the transaction, required him to take up the shares at 57. The defendant refused, and the plaintiffs sold the shares, which

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realized a less price, and they now sue the defendant for the difference between the price at which the shares were carried over and that at which they were sold.

Apart from any consideration of the usage and rules of the Stock Exchange, and assuming that a proper appropriation had been made of the shares by the brokers, it is in my judgment clear to demonstration that the jobbers can sue the client of the brokers on the ground that the client was the undisclosed principal of the brokers, and that when the brokers became defaulters and the jobbers discovered who was the principal, they had a right to call upon the principal to fulfil the contract made through the brokers. But it is said that there is no such right, because the transaction between the principal and the brokers was on the Stock Exchange, and the agreement between them was that the dealings should be carried on according to the usages and rules of the Stock Exchange. In my opinion, the meaning of that is that a client agrees with his broker that the dealings between them are to be carried on under the rules of the Stock Exchange so far as they are applicable to outsiders, and not under the rules that are applicable only to the domestic forum of the Stock Exchange. The first objection taken on behalf of the defendant is that rules 53 and 54 alter the position of the client as an undisclosed principal; but I cannot see that they alter the rule of law as to the right of a contracting party to sue an undisclosed principal to the contract when it is ascertained who the undisclosed principal is.

I come then to rule 177, as to which there is more that can be said. If this rule applies to outsiders, and not merely to members of the Stock Exchange, the position taken up by the defendant might be well founded. He could in such a case say that when the brokers became defaulters the transaction between himself and the brokers closed automatically by reason of the rule, and that, the matter having been closed, the jobbers are not entitled to sue him on the contract. The answer to this suggestion is that the rule does not apply to outsiders. It is one of a group, numbered 174 to 181, under the heading "Official Assignees." In my opinion, these rules do not apply to outsiders, but they apply to the internal economy of the

Stock Exchange, and to arrangements made between members. The persons who are mentioned in the rule as having accounts open with the defaulter are persons on the Stock Exchange who have transactions with him as to buying or selling shares, and the differences are to be paid to or claimed from the official assignee. The client of a defaulting broker is not within the rule, and does not incur any liability under it, nor does he get anything out of the pool that is created under the rule. I have not to rely in this matter only on my own judgment, for the decision in *Ex parte Grant, In re Plumbly* (1), has a bearing on the present case, for, in my opinion, it is a decision of this Court that rule 177 applies to the domestic affairs of the Stock Exchange, and does not apply to the outside public. In that case there was a discussion during the argument as to rule 168 of the then existing rules, which is identical with rule 177 of the present rules, and as to that and other rules James L.J. said it was not necessary to the determination of the question before the Court to say to what extent these contracts on the Stock Exchange affect other contracts, and he added: "I cannot conceive that the contracts of the outside world can be affected by what has been done in this case under the rules of the Stock Exchange." There had been in that case default by a broker and automatic closure of his contracts under the rules of the Stock Exchange, and it is that to which the Lord Justice was referring. He added further: "If any outside persons had any rights, they still have them in their entirety, whatever they may be." And again: "Whatever the liabilities and rights of the outside world may be they remain unaffected." Cotton L.J. pointed out that the fund in the hands of the official assignee was an artificial one created by the rules of the Stock Exchange for a particular purpose, and that it only has an existence for the purpose of being dealt with in a particular way. For myself, I cannot read these judgments otherwise than as a decision that rule 177 is a domestic rule which does not bind an outsider, and does not automatically close the transaction so far as he is concerned, or affect his liability as an undisclosed principal. Then it is

(1) 13 Ch. D. 667.

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said on behalf of the defendant, that even if he is wrong on this point, by the usage of the Stock Exchange, on default of the broker, the client has an option to close the transaction, and it was agreed that if the defendant had that right he has exercised it. It is said, on the other hand, that there is no such usage, and that was stated in evidence in this case in plain language by the official assignee. There is no evidence to the contrary effect; but it is said that the reported cases shew that statements have been made from time to time on the trial of cases arising out of Stock Exchange transactions that there is such an option. On looking at the cases, it is clear to me that there never has been a judicial finding as to whether this usage exists. Statements have been made on the subject in some of the cases, and in *Anderson & Co.* v. *Beard* (1) Mathew J. said that he understood, in accordance with the course of business, there were three courses open to the client, one of them being to close the contract at the hammer price. When the evidence of Dr. Richardson was given in this case, my brother Mathew came to the conclusion that the client could not as a matter of right take that course. I cannot say that the usage relied on has been established in Courts of Law in such a way that the Courts would take cognizance of it and adopt it as a custom or usage that had been proved. I think this point also fails the defendant. The learned judge has negatived any agreement between the defendant and the plaintiffs to treat the matter as closed at the price fixed by the official assignee.

I now come to the last point. It is said there was no privity of contract between the jobber and the client because no parcel of 300 shares was allocated by the broker to the client, the consequence of which would be that the defendant could not have sued the jobber for not delivering these shares, nor can the jobber sue the defendant for not paying for them on the settling day. There is another case coming before the Court on this point, but I am of opinion that in this case we are clear from all difficulty. I do not go further back—nor do I think it is necessary to go further back—than the mid-December

(1) [1900] 2 Q. B. 260.

account. The evidence, which the learned judge did not discredit, is that the brokers had allocated 300 shares to the defendant. If this is believed, and unless the accounts were made up for the purpose of making a case, of which I see no evidence, that fact, taken with the evidence afforded by the entry in the contango book, shews that out of the whole number of shares bought for the defendant a parcel of 300 was allocated to him and carried over with the plaintiffs, and that the remainder were carried over with other brokers. In my judgment this point also fails the defendant, and the appeal must be dismissed.

COLLINS L.J. On the point as to privity being established by reason of the way in which the shares were allocated, I have felt some difficulty; but as to the other parts of the case, notwithstanding the very able argument addressed to us, I have not been able to feel much uncertainty. With regard to the question of whether privity can be created between a jobber and the client of the broker who gives the order, clearly at common law such privity would be raised. I do not think that is disputed; but it is said that the effect of the rules of the Stock Exchange, which have been referred to in the course of the argument, is to prevent privity being established between the outside client and the jobber. I do not so read the rules, and I think that the rules relied upon would govern the relations between the members of the House themselves—brokers and jobbers. They are principals towards each other, but I do not think those rules affect the rights of outsiders. That would be my own view; but I think further that more than one of the cases cited (it is enough to refer to one of them) is a clear authority that that privity does exist. The case I refer to is *Nickalls* v. *Merry*. (1) I will read one or two passages from the judgments of the learned Lords who heard that case, which seem to me to decide conclusively that such privity exists. Lord Cairns says this (2): "It cannot be disputed that a valid contract was made between the respondent, through his broker, and the appellant; and that this contract

(1) L. R. 7 H. L. 530. (2) L. R. 7 H. L. at p. 538.

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continued for some time to be binding on both." The respondent was the outside client and the appellant was the jobber. Lord Chelmsford throughout his judgment takes the same view. There is one passage in which he says (1): "The counsel for the appellant argued that the respondent when, as undisclosed principal, he adopted the broker's contract, adopted it in omnibus; that by a regulation of the Stock Exchange" such and such effects were produced. He decides the effect of the rules of the Stock Exchange was not that contended for, but he does adopt the argument to the extent of treating the contract as one which the respondent as undisclosed principal was entitled to adopt. He goes on: "How then can this rule operate to deprive the respondent of his right to institute legal proceedings against the appellant upon his unperformed contract?" He thus asserts the right in the undisclosed principal to insist on the performance of the contract by the jobber. Lord Hatherley puts it even more clearly (2): "Nobody denies that when a broker sells shares for his principal (who is what is called an 'outsider,' and who has employed him to sell the shares) to anybody in the market, whether a jobber or a broker, there is a good and valid contract made between those parties, that is to say, between the person whose shares are to be sold and the jobber who purchases those shares from the vendor's broker." I do not think I can find a much clearer statement of the existence of privity than that case in the House of Lords.

Now, I come to the other question that was so much debated, and which also rests upon the true interpretation of certain rules, and that is whether the rules as to what is called hammering bind the outsider except so far as they are tempered by usage. I am dealing now with the rules only, and the argument is that rule 177 untempered by the usage has this effect—that when the broker is hammered the transaction between the broker and the jobber is closed, and that therefore the right of the principal to come in and sue as principal is gone, and the effect of the rule, therefore, is that the transaction is closed for all purposes. If that were the case it might have this effect—

(1) L. R. 7 H. L. at p. 545. (2) L. R. 7 H. L. at p. 547.

that a person who has ordered his broker to buy for him in an advantageous market at a very low price certain shares in the hope that they may rise considerably before the day of delivery, and where the market in point of fact did rise, and there would be a very considerable profit on the transaction, is liable to have that transaction interrupted by the broker making default on the second day after the purchase. The contention is that under that rule the rights of the parties to that contract are finally closed and ascertained on that date, and that the person who gave the order in the hope of making his profit by the market rising before the day came for complete performance is obliged to acquiesce in that order being cut short and finally closed. I think that not only the terms of the rules, but the headings under which they are placed, point to this set of rules as being rules regulating the relations between members of the Stock Exchange. Not only is that, as it seems to me, the real interpretation of the rules, but I think it has been conclusively settled by authority in the case of *Ex parte Grant, In re Plumbly*. (1) I think that decision carries with it this—that that set of rules is exclusively framed to meet the particular emergency and ascertain rights between members of the Stock Exchange themselves, and does not govern the rights of persons outside. That is the principle on which the case decided that the differences ascertained by that process and paid to the official assignee of the Stock Exchange could not be appropriated by the trustee in bankruptcy of the defaulting broker. That principle rested on this, as it seems to me—that the sums payable and receivable by the different parties within the House on that settlement were not the sums payable or receivable under the contracts of the outside principals. If they had been, it seems to me, it would be very difficult to say that the trustee could not have reached them. It seems to me that that case involves an affirmation that these rules do not have the effect of closing or defeating the rights of the outside persons. In fact, in one passage in the judgment James L.J. said as much in express terms (2): "The official assignee claims these differences in his own right, and of course the payment which was

(1) 13 Ch. D. 667.
(2) 13 Ch. D. at p. 679.

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made to him would not discharge the debtor if the debtor had paid it to the wrong man; he would still remain liable to pay it to the other. Whatever the liabilities and the rights of the outside world may be, they remain unaffected." But it is said that the usage of the Stock Exchange, which undoubtedly as to a considerable part of the suggested usage does exist, throws a light on the main contention, because it is suggested that the usage is required to mitigate that state of things which would otherwise arise. It seems to me to be equally consistent with the facts that the usage is simply an exercise of the unimpaired common law rights which have been left open notwithstanding the rule. Then we come to the question, How far is that part of the usage which is relied on proved? It is said that this Court ought to take judicial notice of the usage, and that the outside client has the option of saying that he will close the transaction at the price fixed by the official assignee. Of course, nobody denies that the jobber and he together might agree to take this course; but that is a different thing from a right in invitum the jobber to compel him to acquiesce in the settlement. Undoubtedly there is a series of cases in which the custom or usage of the Stock Exchange was stated in terms which would support this contention; but in the particular case before us the official assignee of the Stock Exchange was called and gave evidence, and that was the only evidence of fact in the case (and usage is a question of fact), and he denied the existence of any such usage. That evidence Mathew J. adopted; so the only question for us on the state of the facts in this case is whether the custom, embracing that part of it which is relied on, has been so often proved in the Courts that this Court is bound to take judicial notice of it, notwithstanding that in this particular case the person who is the chief exponent and expert in this matter has told us the usage does not exist. It does not appear to me that the way in which affidavits and statements of usage got into the former cases gives such a ground as has been hitherto treated as necessary for the Court to take judicial notice of a custom. In cases in which mercantile customs come in question, juries so often gave verdicts confirming the existence of those customs that at

length the Courts of Law took notice of them and treated them as established. Nothing of that kind has taken place in the cases referred to. There have been affidavits that have been adopted as statements for the purposes of the particular cases; but there has been no usage ascertained by the findings of juries in the manner that I have pointed out. Therefore it seems to me that the contention founded on the point of usage also fails.

I now come to the last point—the question of appropriation of shares so as to create privity of interest. In dealing with this question we are asked to apply the doctrine laid down in *Robinson* v. *Mollett*. (1) In that case the Court was dealing with a custom by which the plaintiff having no knowledge of it was held not to be bound. In this case we are dealing with the custom of the Stock Exchange, with which all the parties must be taken to be cognizant. I give no opinion whether in any future case that may arise that will make any difference, and I will treat this case as though the principle laid down in *Robinson* v. *Mollett* (1) applied. I have come to the opinion that the difficulty raised in that case does not exist in the one before us. When it came to the last carrying over, which is the only one we are concerned with, it was a purchase by the broker on behalf of his principal of the shares that were carried over. On examining the account for mid-December I find that, with the exception of 250 shares carried over by the brokers for Girdwood, all the rest purport to be carried over for the defendant. If there is any evidence on which the learned judge was justified in acting to shew that these 250 shares were in fact appropriated at the time of carrying over, in other words, bought for Girdwood, we are bound by the conclusion at which he arrived. I think there was evidence, because I do not know to what we can look except what the broker had in his mind when he bought the shares; and it seems to me that if he tells us what his intention was, that is good evidence of the fact. The only thing to rebut this conclusion would be that he had carried over the same number of shares previously for the defendant and not for Girdwood. However, his evidence

(1) L. R. 7 H. L. 802.

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is that on this occasion he carried those shares over for Girdwood. The learned judge has adopted that, and I think it is a question of fact in which he was quite justified in coming to that conclusion.

That does not exhaust the case, because it leaves a question as to the 640 shares, which was the full number carried over for the defendant. These were not carried over, that is, they were not bought in one block; so that no privity was created as to one block of 640 shares. That number was made up of four different blocks, one of them being the 300 bought from the plaintiffs on which this case arises. It is argued that this 300 forms part of a block of 330 shares bought by the broker for the defendant from the plaintiffs. Supposing the order to have been to buy 330 shares, it seems to me that it would have been a legitimate way of carrying out that order to buy 300 from one person and 30 from another, and that this would create privity as to the 300 with the person from whom they were bought, and as to the 30 from the person from whom they were bought. I am inclined to think that would have been the case at common law, but it certainly is when the usage of the Stock Exchange, by reference to which the bargain was made and the work done, is taken into consideration. I think, having regard to that usage, there is a request to the broker to buy, in the events which have happened, 300 shares from one broker and 30 from another, and if that request is made and the order is executed privity is established with each of the vendors in respect of the shares bought from him.

That appears to me to dispose of all the points raised in the case on behalf of the defendant, and I am of opinion that this appeal should be dismissed.

ROMER L.J. I agree. The question is whether there is anything in the rules or usages of the Stock Exchange which enables the client of the broker on the one hand and the jobber on the other to say that there cannot be privity of contract between them in respect of a contract for the sale or purchase of shares entered into by the broker for his client with the jobber. I think not. There are, no doubt, certain rules

which bind the client and the broker. Those rules which clearly bind the client in no way govern this case or negative the existence of a contract between the client and the jobber which may be enforced when necessary. There are a few rules, however, which, if they were intended to bind or affect the client of the broker, may point in the direction of there being no such privity recognised or existing. But I think that these rules when examined will all be found to be rules which only govern the rights and liabilities of the jobber and the broker inter se, and which are not rules intended to affect or to bind the client on the one hand, or the jobber on the other, as regards their rights and liabilities inter se. I may refer, by way of example, to rules 53 and 54, and with regard to rule 177, about which so much has been said in the course of the argument, I am clearly of opinion that the group of rules in which rule 177 finds a place contains rules intended only to apply as between jobber and broker as members of the Stock Exchange, and not intended to affect or bind outsiders. Looking at those rules which commence at rule 174, to my mind it is clear that the object was to create what has been called an artificial fund for certain Stock Exchange purposes, and to provide the necessary officers of the Stock Exchange who shall collect that fund and distribute it, and the rules on their face shew that they were only intended to bind the members of the Stock Exchange between themselves. That is obvious, not only from the wording of the rules, but also from the results to which those rules lead; for if they are examined it will be found that an outsider, the client of the broker, is in no way bound to contribute to the fund, and, on the other hand, he is not entitled to share in the fund. The whole of those rules, from 174 to the end, are, as I have said, taken up with creating an artificial fund for Stock Exchange purposes, and are not intended to benefit or injure the client of the broker in respect of the relations between himself and the jobber. I think this point has been decided in principle in the case of *Ex parte Grant, In re Plumbly*. (1) When the reasoning of that decision is examined, it will be found that substantially the judges took

(1) 13 Ch. D. 667.

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the view of these rules which we are now expressing. Then with regard to the usages of the Stock Exchange, apart from rules, I will only say this—that so far as they are proved in the case before us, they are quite consistent with the existence of privity of contract between the client of the broker and the jobber, and no usage has been proved that on the default of the broker the client shall have the option as against the jobber, or the jobber have the option against the client, to treat the contract of purchase or sale as closed at the prices ruling at the date of the hammering. We can only recognise the evidence that exists in this particular case; and on the evidence before us it is clear to my mind that we must accept the usage proved as not giving or conferring any such option, nor, indeed, has the existence of such a usage conferring such an option been so established in other cases or so generally recognised that we ought to assume its existence. On the contrary, I cannot find that in any case the existence of such a usage has been definitely proved where the existence of it was material for the decision of the case, or any case in which it has been recognised by the judges as a usage of which the Courts take judicial cognizance. I will add this with regard to the argument which was very forcibly put forward on behalf of the defendant: admitted that by the usage of the Stock Exchange a broker may properly execute the instructions of his client as to purchase or sale without creating privity of contract, that is to say, he might do this without rendering himself liable for breach of duty to his client, yet in my opinion that does not justify the inference that, if the broker does execute the instructions in such a form as would at common law create privity of contract between the client and the broker, we ought to hold, or it ought to be inferred, that that privity of contract must be held nevertheless not to exist for the purpose of contracts on the Stock Exchange. I do not think that is an inference which follows or one which we ought to draw.

That brings me to the last point in the present case. On the facts proved, was there privity of contract between the client and the jobber? I think there was when the evidence is looked at as a whole. There would be to my mind a great

difficulty in dealing with this question if we had to consider the transactions before the mid-December account; but in my view we have not to do so. It is clear that where a client gives instructions to a broker on the Stock Exchange to carry over a contract—say a contract for purchase, as in this case—it is not the case of merely getting further time to continue the old contract; it is an instruction that the broker is to effect a new contract. Now, if that is borne in mind, what took place on the mid-December account is clear. At that time the broker had only to buy shares for two clients. He had to buy 250 shares for Girdwood, and he had to buy 640 for Hamblet. On the evidence before us, I think we ought to take it as proved that at that time the broker did buy from Nickalls 230 shares for Girdwood, and that he did buy Hamblet's 640 shares as follows: 300 from Levitt, the jobber in the present case, and the others from other jobbers whose names I need not detail. If that is so—and I think the evidence shews that—then the only question that arises is, Was the broker justified in buying the 640 shares of Hamblet's from more than one jobber so as to effect privity of contract in each case? In my opinion he was. I need not decide the point as to the duty of an agent at common law; but I should be disposed to think that he might even at common law act in that manner in respect of such things as are analogous to shares with which we have to deal in this case. Undoubtedly to my mind, when the practice on the Stock Exchange is considered and the manner in which the dealings in respect of shares are carried on there, it is clear that the broker had authority to buy the 640 shares from more than one jobber, and that if he did so—and it was proved that the shares he bought from the different jobbers for his client exactly amounted to 640, neither more nor less, certainly not more—then there can be no doubt that, the broker being authorized to execute the instructions of his client in that way, privity of contract would be established in respect of those shares as between the different jobbers and the client. That being so, there would in the present case be privity of contract established. Before I pass from this point I would add one remark about what was said with reference to certain statements

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Romer L.J.

made by Lord Chelmsford in *Robinson* v. *Mollett* (1) about a mere intention of appropriation not establishing privity. I think that the effect that was sought to be given to that statement of Lord Chelmsford as if it were a decision that the intention was always immaterial cannot be supported for the reason given during the argument, that the appropriation in that case would have involved the taking of a part out of the whole bulk. I should like further to say that whether a person does or does not buy at a particular time shares for a certain undisclosed principal is a question of fact, though it may depend on the intention of the person at the time he buys, and though it may be difficult to prove the intention as a question of fact, yet undoubtedly as a matter of law it may be done, and it is not right to say that because it may be a difficult thing to prove the intention cannot be proved. There are many cases in which it is essential to prove intention as a question of fact; and when it is essential, then it is necessary to get such evidence as can be obtained on the subject in order to ascertain—which is no doubt always a difficult thing—what was in a man's mind at the time of a certain act being done. That often has to be done and is done from day to day, and it is impossible to say, when you once get the position that the question of intention is a question of fact, that you are not at liberty to prove certain facts because they depend on intention. For these reasons I agree in thinking that the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Morley, Shirreff & Co.*
Solicitor for defendant: *Albert Myers.*

(1) L. R. 7 H. L. 802, at p. 837.

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1901
April 19.

BECKHUSON & GIBBS *v.* HAMBLET.

Stock Exchange—Principal and Agent—Broker including Several Orders in One Contract—Liability of Principal to Jobber—Usage of Stock Exchange —Privity of Contract.

APPEAL from the judgment of Kennedy J. (1)

The action was for failure to take delivery of shares purchased.

The defendant, an outside stockbroker, having employed a firm of brokers on the Stock Exchange to purchase for him 210 shares in a certain American railway company, instructed them to "carry over" the shares to the next account. The brokers, having another order to carry over 150 shares in the same company from a person other than the defendant, for the purpose of carrying out these orders, purchased by a single contract in their own name from the plaintiffs, who were jobbers on the Stock Exchange, 360 shares in the company for the next account, and appropriated in their books to the defendant 210 of the shares so purchased. The brokers having been declared defaulters on the Stock Exchange before the settlement, the plaintiffs, when the settling day arrived requested the defendant to take up the 210 shares, and, on his refusing to do so, sold them at a loss, and sued the defendant for the difference. The learned judge held that, the brokers having lumped the defendant's order with the order of another client, and contracted in a single transaction with the plaintiffs for the purchase of a larger number of shares than they were authorized to purchase for the defendant, no such contractual relation existed between the plaintiffs and the defendant as would support the action.

Isaacs, K.C., G. A. H. Branson with him, for the plaintiffs, on the hearing of the appeal, stated that, if the Court were of

(1) [1900] 2 Q. B. 18.

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opinion that the evidence in the action did not establish the existence of a special usage of the Stock Exchange, by which in such a transaction privity of contract was created between the plaintiffs and the defendant as regards the 210 shares, he was not prepared to contend that, in the absence of proof of such a usage, the plaintiffs could succeed in the action, but asked the Court to order a new trial on the question as to the existence of such a usage.

Herbert Reed, *K.C.*, and *E. Morten*, for the defendant, were not called on to argue.

THE COURT (A. L. Smith M.R., Vaughan Williams L.J., and Romer L.J.) were of opinion that the evidence in the action did not establish the existence of such a usage as before mentioned. They refused to order a new trial, and dismissed the appeal, but stated that its dismissal must not be taken in any way to prejudice the plaintiffs' right to raise the question as to the existence and validity of such a usage in any subsequent action in respect of a similar transaction.

Appeal dismissed.

Solicitors for plaintiffs: *Spyer & Sons.*
Solicitor for defendant: *Albert Myers.*

E. L.

BLAND *v.* BUCHANAN.

1901
March 12.

Municipal Corporation—Election of Mayor—Validity of Vote of Disqualified Person—Right of Chairman to Vote—Casting Vote—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 42, *sub-s.* 1; *s.* 61, *sub-s.* 4; *s.* 87, *sub-s.* 1 (*d*); *s.* 102.

A town councillor, whose election is subsequently declared void, cannot prior to the avoidance of his election give a valid vote at the election of mayor.

Nell v. *Longbottom*, [1894] 1 Q. B. 767, followed.

The right under the Municipal Corporations Act, 1882, of the mayor of a municipal corporation to vote at the election of his successor can only be modified or taken away by a statutory enactment expressed in unequivocal language.

The expression "equality of votes" in s. 61, sub-s. 4, of the Municipal Corporations Act, 1882, means equality of valid votes, and therefore the mayor or chairman presiding at the election of a mayor may give a contingent or hypothetical casting vote, to come into operation if in the course of subsequent proceedings it should appear that there has been an equality of valid votes.

ARGUMENT of points of law reserved by a Commissioner for the trial of municipal election petitions. The case stated by the Commissioner was as follows:—

This was a petition under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), against the return of the respondent to the office of mayor of the city of Gloucester. The election was held on November 9, 1900, when the respondent was declared to be elected. The petition prayed that it might be declared that the respondent was not duly elected, and that his election was null and void, and that the petitioner was duly elected and ought to have been declared elected.

It was proved on the trial that on November 9, 1900, the petitioner and respondent were candidates for the office of mayor; that William James Newth purported to vote for the respondent, and his vote was counted as being a good vote for the respondent; that Frank Treasure, who had been elected mayor on November 9, 1899, presided as chairman at the said election and purported to vote thereat for the respondent in

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the first instance, and counted the vote so given as being a good vote for the respondent; that sixteen votes, including those of Newth (as to the validity of whose vote I have already reserved a question in the case of *Ford* v. *Newth* (1)), Treasure, and the respondent, purported to have been given for the respondent, and fifteen were given for the petitioner, and that Treasure, thinking that Newth's vote might be impeached, purported to give a casting vote for the respondent, and counted the said casting vote as a good vote.

By the Local Government Board's Provisional Orders Confirmation (No. 14) Act, 1900 (63 & 64 Vict. c. clxxxiii.), the area of the city of Gloucester was extended. By art. 9 it is provided that "for the purposes of the election of a town council for the city in pursuance of the Municipal Corporations Acts in the month of November, 1900, the following provisions shall apply: (*a*) The town clerk and the mayor of the existing city, or such other persons as the Local Government Board shall appoint, shall perform the duties devolving upon the town clerk and mayor respectively under the Municipal Corporations Acts, and the mayor of the existing city or such other person as he shall appoint shall be the returning officer at the election for each ward; (*b*) thirty councillors of the city shall be elected on November 1, 1900, and ten aldermen of the city shall be elected on November 9, 1900; (*c*) notwithstanding anything in the Municipal Corporations Acts to the contrary, all the councillors of the existing city who shall be in office on November 1, 1900, shall go out of office on that date, and all the aldermen of the existing city who shall be in office on November 8, 1900, shall go out of office on that date, and all such councillors and aldermen shall be eligible for election as councillors on November 1, 1900." Mr. Treasure, who had been a councillor up to November 1, did not avail himself of

(1) [1901] 1 K. B. 683. This statement is erroneous, the only question raised in *Ford* v. *Newth* having been the validity of Newth's election. During the argument of the present case it was agreed that it should be taken to raise the question whether Newth's vote upon the election of the mayor was good, notwithstanding that Newth had at the time a contract with the council in respect of which his election had subsequently been declared void.

that provision, and was not re-elected among the thirty councillors who were elected on November 1.

At the conclusion of the trial, after hearing the arguments of counsel, I determined, subject to the opinion of the High Court of Justice on the question of law hereinafter submitted, that Mr. Treasure was entitled to vote as mayor in the first instance, but that the second so-called casting vote which he gave was bad, but I postponed granting a certificate until the questions which I now submit for the consideration of the High Court of Justice had been determined by them. The questions are:—

(1.) Was Mr. Treasure as mayor entitled to vote in the first instance?

(2.) Was he under the circumstances above stated entitled to give a casting vote?

H. Terrell, K.C. (*Lewis Coward, K.C.*, and *Daldy* with him), for the respondent. Newth's vote at the election of mayor was good, notwithstanding that his own election as a town councillor was subsequently declared void by an election court. But for the decision in *Nell* v. *Longbottom* (1) his vote would have been good under s. 42, sub-s. 1, which renders valid the acts of a disqualified person while acting in a corporate office, for his vote was given while so acting; that case, though binding upon the Commissioner, is not binding upon this Court, and, being at variance with the provisions of the statute, ought to be reviewed. The vote is, however, good under s. 102, which in terms validates acts done in the execution of a corporate office by a person who is subsequently declared not to have been duly elected, and voting at the election of mayor is an act done by a councillor in the exercise of his office of councillor. (2)

(1) [1894] 1 Q. B. 767.

(2) By 45 & 46 Vict. c. 50 (The Municipal Elections Act, 1882), s. 42, sub-s. 1, "The acts and proceedings of a person in possession of a corporate office, and acting therein, shall, notwithstanding his disqualification or want of qualification, be as valid and effectual as if he had been qualified."

By s. 102, "Where a candidate who has been elected to a corporate office is, by a certificate of an election court or a decision of the High Court, declared not to have been duly elected,

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Asquith, K.C. (*Ruegg, K.C.*, and *S. H. Day* with him), for the petitioner. The validity of Newth's vote is concluded by *Nell* v. *Longbottom* (1), which was rightly decided. Under s. 87, sub-s. 1 (*d*), of the Municipal Corporations Act, 1882, a municipal election may be questioned on the ground that the person was not duly elected by a majority of lawful votes; but if s. 42 operates to validate any act done by a de facto councillor, including any vote given by him, it follows that such an election as the present cannot be questioned by a petition under s. 87, sub-s. 1 (*d*), on the ground that the successful candidate had not a majority of lawful votes. Sect. 42 must be read subject to the express provision of s. 87, sub-s. 1 (*d*), and in that case does not validate a vote given by a person subsequently declared to have been disqualified. Nor is the vote good under s. 102.

DARLING J. We both think that Newth's vote was bad, and will give our reasons when we give our decision on the whole case.

Asquith, K.C., for the petitioner. Both the original vote and the casting vote given by the mayor were bad. No doubt the original vote would have been good, had it not been specially dealt with by the Legislature, for the provisions of the Municipal Corporations Act, 1882, entitle an outgoing mayor to take part in the election of his successors. But those provisions are incapable of application to such a case as the present, where a new city was substituted for the existing one, and the Local Government Board's Provisional Orders Confirmation (No. 14) Act, 1900, modified what would have been the state of things in an ordinary case. The effect of art. 9 is that the mayor only continued to exist as the returning officer for the purposes of the election of a town council; in all other respects he ceased to be mayor, just as the aldermen and town councillors ceased to hold their offices; he had no right to be present at the meeting of the new council and take part in the election of

acts done by him in execution of the office, before the time when the certificate or decision is certified to the town clerk, shall not be invalidated by reason of that declaration."

(1) [1894] 1 Q. B. 767.

the new mayor. His casting vote was also bad, the power to give a casting vote being confined by s. 61, sub-s. 4, of the Act of 1882, to cases of an equality of votes. There was here no equality of votes, for there was a majority of one on the assumption that the votes were all good, and the mayor had no power to decide as to the validity of any of the votes; votes actually given can alone be regarded in deciding as to an equality. The mayor cannot give a hypothetical or contingent casting vote; his right to a casting vote cannot depend upon the result of a subsequent investigation into the qualification of one of the voters.

H. Terrell, K.C., for the respondent. The original vote was good. The Act of 1882 provides for the continuance in office of the mayor until his successor is elected, and art. 9 of the provisional order provides that the mayor of the existing city is to perform the duties of mayor under the Act of 1882.

[CHANNELL J. That is for the purpose of the election of the town council.]

Yes; but by s. 10, sub-s. 2, of the Municipal Corporations Act the council includes the mayor, and therefore one of the duties of the mayor was to preside and vote at the election of his successor. The casting vote was good. "Equality of votes" in s. 61, sub-s. 4, means an equality of valid votes; and as it was known that a petition against Newth had been presented before the election of mayor, it was a reasonable and proper thing for the chairman to give a casting vote, he having no power to determine the validity of Newth's vote.

DARLING J. The first point argued before us was that the vote of Newth given at the election of the mayor was good. Upon the hearing of the election petition Newth was held to be disqualified by reason of a contract with the corporation from standing as a candidate for, or being elected a member of, the town council, and on appeal the learned Commissioner's decision was affirmed; Newth was therefore, as one would suppose, a person who was not able to give a valid vote on the election of the mayor. It is contended, however, that, as he in fact voted, his vote cannot be questioned, because of the provisions of s. 42 of the Municipal Corporations Act, 1882.

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Darling J.

That section has been the subject of judicial decision in *Nell* v. *Longbottom* (1), and if that case was rightly decided the appellant's argument on this point fails; it is contended, however, that the decision was wrong and that it is not binding upon us. It may be that, strictly speaking, that case is not binding upon us, and I do not base my decision upon the ground that it is; I think that it was rightly decided. I am of opinion, therefore, that the validity of Newth's vote may be questioned, and that not only his own election as councillor, but also his vote given as a councillor upon the election of the mayor, can and must be held to be bad; therefore his vote must be disallowed.

The next point arises in this way. In the election of the new mayor of the enlarged city, the gentleman who was the mayor of the old and smaller city voted, and it is contended for the respondent that he had the right to do so, and that this vote, which is styled his original vote, was good. It is admitted for the petitioner that if the validity of this vote depended upon the statutory provisions of s. 10 and s. 15, subs. 3, of the Act of 1882 alone, it was good, but it is said that it is bad because the general law, under which it would have been good, was modified or reversed by the Local Government Board's Provisional Orders Confirmation Act, 1900. Now, the object of the provisional order confirmed by that Act was this: the boundaries of the city of Gloucester were to be enlarged, and a corporation was to be given to the enlarged city; and for this purpose it was necessary that the corporation of the old city should come to an end; the provisional order provided how this was to be done. It provided that the old corporation should cease to exist upon a given day, and that the old aldermen should also cease to exist; but it did not say in so many words that the mayor should cease to exist. It is said that the provision of art. 9 does not take away the title of mayor; but the petitioner contends that the effect of that article was to destroy his functions as a mayor, and to preserve him as returning officer only. But what was he to do? He was to act for the purposes of the election of the town council and to perform the duties of mayor under the Municipal Corpora-

(1) [1894] 1 Q. B. 767.

tions Act, 1882, and one of those duties or functions was to sit at the election of the new aldermen and the new mayor. He was not only under the Act to be the returning officer for the return of the town councillors; he had something else to do as mayor under the Municipal Corporations Act. It is true that the Local Government Board could have appointed some other person to perform those duties, and if they had done so a much graver question would have arisen: possibly the mayor would have been entirely deprived of all his duties under the Act; but I do not decide that point, which does not in fact arise, no such appointment having been made. This gentleman was therefore mayor by title, and he was the returning officer at the election of town councillors; the only question left is whether he was mayor for the purpose of performing the duties imposed upon the mayor under the Municipal Corporations Act, 1882. He was a part of the town council, and it appears to me that the language of the provisional order includes the doing of something as mayor; and although he was the mayor of a corporation that had gone, the provisional order, in my opinion, did not deprive him, nor did it intend to deprive him, of his power under the Act of 1882 of voting at the election of mayor. I think, therefore, that the original vote was good.

There remains the question of the validity of the mayor's casting vote. There was an equality of valid votes if Newth's vote was bad and had to be struck off; if not, if Newth's vote was good there was no equality of valid votes; it was perfectly well known at the time of the election that Newth's vote was challenged, and that a petition had already been presented against his election as councillor. In those circumstances the mayor gave his casting vote, and in doing so he seems to have practically said that he gave it in case there turned out to be an equality of votes. The event has shewn that there was an equality. It is said, however, that the mayor could not give a contingent casting vote, and that a casting vote could only be given in case of there being an equality of persons who in fact voted. I do not think that that is the meaning of the provision; I think that it means that a casting vote may be given

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Darling J.

by the mayor if the number of valid votes is equal, and I think that there may properly be a casting vote to take effect if the valid votes are equal, and not to take effect if they are not. Upon the whole case, therefore, I am of opinion that Newth's vote was bad, that the mayor's original vote was good, and that his casting vote was good, and that the respondent, for whom he voted, was duly elected by a majority of one; our judgment, therefore, must be for the respondent.

As to the question of leave to appeal, I am personally of opinion that the decision in *Nell* v. *Longbottom* (1) was right; but the question raised is a grave one, and I think that there should be leave to appeal upon all the three points.

CHANNELL J. I agree with the judgment of my brother Darling upon all three points, and have very little to add. I think, however, that I may say that it is right that we should follow the decision in *Nell* v. *Longbottom* (1), apart from the question whether it is strictly binding upon us; it is a judgment of two judges upon an election petition, the decision is in point, and it would be wrong for us to say that it was wrong. But although I have not thought it my duty to consider whether the decision is right, and although I do not wish to be understood to have formed any opinion that it is wrong, I feel bound to say that I think the reasoning upon which it proceeded inconclusive. The reasoning appears to be this. First, s. 42, sub-s. 1, says that "The acts and proceedings of a person in possession of a corporate office and acting therein shall, notwithstanding his disqualification or want of qualification, be as valid and effectual as if he had been qualified." The judgment then points out that s. 87, sub-s. 1, provides that a municipal election petition may be presented, founded upon the ground that the person whose election is questioned was not duly elected by a majority of lawful votes. If these two provisions covered the same ground the reasoning would be conclusive; but there are many cases that might be suggested in which a municipal election petition might be presented upon the ground that the person elected had not a majority of lawful votes, and yet the question as to the validity of the act of a

(1) [1894] 1 Q. B. 767.

disqualified person might not be involved. For instance, where there is an election of a town councillor by the burgesses at large, there is no question of any disqualified person acting in a corporate office and his act being validated. Another example would be that of a petition presented on the ground that a person voted who was prohibited from doing so as having a pecuniary interest. Therefore, there are many cases which would satisfy s. 87 and constitute a ground for presenting a petition, notwithstanding that s. 42 had the operation contended for. It seems to me, therefore, that the reasoning in *Nell* v. *Longbottom* (1) is inconclusive; I do not say the decision is not well-founded, but it is open to the criticism which I have made upon it. Consequently, as this matter is one of very general importance, I agree that there should be leave to appeal.

As to the mayor's original vote, I have nothing to add. It seems to me that the general policy of the Municipal Corporations Act, 1882, is to retain the mayor in office until his successor has been appointed. There are special provisions in the provisional order, but they do not seem to me to indicate any intention to interfere with that policy: consequently it stands untouched. As to the casting vote, there seems to be no authority. But it was a very practical, businesslike view for the mayor to say, as he in effect did say: "In order to prevent any question hereafter, as I do not know whether I have a casting vote or not, if I have I declare it is given for so and so; and if it should be decided that I have a casting vote, then it will be a good one." In my opinion, on general principles, that course might be allowed to be taken; it is a convenient one, and I see nothing in the statute relating to an equality of votes which prevents that being done. I am of opinion that the casting vote should be allowed.

Solicitor for petitioner: *C. T. Courtney Lewis, for W. Langley-Smith, Gloucester.*

Solicitors for respondent: *Ayrton, Biscoe & Barclay.*

(1) [1894] 1 Q. B. 767.

W. J. B.

C. A.
1901
March 27.

[IN THE COURT OF APPEAL.]

In re ARBITRATION BETWEEN MASTERS AND GREAT WESTERN RAILWAY COMPANY.

Lands Clauses Consolidation Acts—Compensation—Lands Injuriously Affected—Lease of Colliery—Right of Lessee to Sink Shaft in Land of Lessor not Demised—Reasonable Approval of Lessor—Purchase by Railway Company—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict.* c. 18), s. 68.

A lease of a piece of land with colliery shaft, buildings, and works thereon, and of the minerals under that and adjoining land of the lessor, the surface of which was not demised by the lease, comprising together 335 acres, contained a proviso that the lessee might at any time during the term sink a pit or pits in any part of the land the surface of which was not demised, but so that the position of such pit or pits should be subject to the reasonable approval of the lessor, his heirs or assigns. A railway company, under the powers of a special Act incorporating the Lands Clauses Consolidation Act, 1845, purchased from the lessor five acres of the before-mentioned surface which was not demised, and occupied the same by their railway and works :—

Held, that the mere fact that the railway company had under their Act taken the five acres for the purposes of their railway was not a reasonable ground under the before-mentioned proviso in the lease for disapproval of the position of any pit proposed to be sunk therein, and that the lessee had a substantial interest under the proviso which entitled him to compensation for being prevented by the railway company's taking the land from exercising therein the right of sinking a pit given to him by the lease.

APPEAL from the judgment of a Divisional Court (Darling and Bucknill JJ.) upon a case stated upon the award of an arbitrator appointed to assess compensation under the Lands Clauses Compensation Act, 1845.

The facts appear in the report of the case in the Court below (1), and may for the purposes of this report be stated as follows. By a lease dated June 24, 1891, Colonel Vaughan Lee, the freeholder, demised to the respondent, Masters, for a term of sixty years from September 29, 1890, a piece of land in the parish of Llanharan, in the county of Glamorgan, coloured yellow on a plan annexed to the lease, and the pits

(1) [1900] 2 Q. B. 677.

and shafts then open thereon, and known as the Lanelay Colliery and Works, and also all the seams and veins of coal which were intersected by, and could be won and worked from the existing pit, and such blackband ironstone and fire-clay as might be associated therewith then lying in or under those several fields, closes, or parcels of land, part of the Lanelay estate and the Great Western Railway running through the same land, situate in the said parish of Llanharan, and containing by estimation 335 acres or thereabouts, and surrounded with the colour pink on the before-mentioned plan (1), and all other seams or veins of coal blackband ironstone and fire-clay below the said seams or veins of coal thereinbefore described, and also all railways, tramways, roads, way-leaves, easements, and conveniences belonging to or used in common with the said colliery and works, together also with the rights and privileges to be exercised in connection with the said mines and minerals which were thereinafter particularly mentioned. The lease then proceeded to give to the lessee the liberty of working the mines and winning and carrying away the minerals thereby demised in manner therein described, and conferred on him various powers, privileges, and easements for that purpose, which it is not necessary to set out, but which included a power of sinking new pits in the land coloured yellow. Save as after mentioned, no surface rights were granted to the lessee except over the land coloured yellow. The lease contained the following special proviso: "Provided always, and it is hereby agreed by and between the said parties hereto, that, if at any time during the said term hereby granted the said lessee, his executors, administrators, or assigns shall think it necessary or desirable to sink a pit or pits on any part of the said land surrounded by a pink line other than the said land coloured yellow, and other than the land surrounded with the colour purple (on or upon which no colliery operations of any sort may be carried on) and shall give notice thereof in writing to the said lessor, his heirs or assigns, then the rights of sinking pits and working minerals as well the demised minerals as other

(1) The land coloured yellow was included in the land surrounded with the colour pink on the plan.

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minerals with the necessary spoil and rubbish, and all other rights, easements, and privileges hereby conferred upon the said lessee shall extend to and become applicable to sinking such other pit or pits on the lands other than those coloured yellow, and the working of such minerals with the necessary spoil and rubbish, as fully and freely to all intents and purposes as if such rights, easements, and privileges had been originally extended to the whole of the lands surrounded by a pink colour, but so that the position of such pit or pits be subject to the reasonable approval of the said lessor, his heirs or assigns, or his or their agent for the time being." The lease contained a clause providing that, if any dispute or difference should arise between the lessor and the lessee touching any clause, matter, or thing whatsoever therein contained or the operation or construction thereof, or any matter or thing in any way connected therewith, or the rights, duties, or liabilities of either party under or in connection with the lease, such dispute or difference should be referred to two arbitrators, one to be appointed by each party, and in case of their disagreeing to an umpire.

By an agreement dated March 15, 1898, the appellants, the Great Western Railway Company, by virtue of powers given by the Great Western Railway (Additional Powers) Act, 1897, and the various Acts relating to the company and their undertaking, and the Acts incorporated therewith (among which was the Lands Clauses Consolidation Act, 1845), agreed to purchase from Colonel Vaughan Lee the fee simple of a piece of the before-mentioned land surrounded with the colour pink, other than the before-mentioned land coloured yellow, which contained about five acres, but not including the mines and minerals therein other than surface clay, for the purposes of their railway.

The respondent at that time occupied the land so agreed to be sold to the appellants as tenant from year to year. By notice dated May 25, and served on May 26, 1898, the appellants gave to the respondent notice to treat for the purchase of the land, the freehold of which they had so agreed to purchase from Colonel Vaughan Lee, and as to the compensation to be made to the respondent by reason of the

execution of the works authorized by the before-mentioned Acts, and required him to give particulars of his interest therein. This notice did not include the minerals, and the appellants never gave any notice to the respondent that they required to take them. On May 25, 1898, the respondent wrote to the agent of Colonel Vaughan Lee to the effect that he had been advised by engineers consulted by him that he should sink a pit in certain fields (being land agreed to be purchased by the appellants under the agreement of March 15, 1898), and that he therefore, in conformity with his lease, gave notice that he should sink a pit in those fields, and that, when the plans of his mineral engineers were complete, he would submit the actual site of the pit, and ask for Colonel Vaughan Lee's agent's approval of it. By notice dated January 28, 1899, reciting that the appellants had entered upon and taken the land agreed to be purchased by the agreement of March 15, 1898, and had injuriously affected other lands wherein the respondent had an interest in respect of which he was entitled to compensation, the respondent gave notice to the appellants that he desired that the amount of compensation to which he was entitled should be settled by arbitration, and that the interests in respect of which he claimed compensation were the yearly tenancy of the surface of the land and the rights given to him by virtue of the before-mentioned special proviso in the lease of June 24, 1891. A single arbitrator was subsequently agreed on by the parties to determine the dispute as to the amount of the purchase-money or compensation to be paid by the appellants to the respondent in respect of the lands and hereditaments entered upon and taken by the appellants, and the compensation, if any, to be paid by the appellants to the respondent in respect of the damage, if any, sustained by him by reason of the severing of the lands taken from the other lands of the respondent or otherwise injuriously affecting such other lands by the exercise of the powers of the Great Western Railway (Additional Powers) Act, 1897, and the Acts incorporated therewith. By award dated July 5, 1899, the arbitrator awarded to the respondent 100*l.* as compensation for his interest as tenant from year to year and 8900*l.* in respect of the damage

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sustained by him by reason of the severing of the land taken from his other lands or otherwise injuriously affecting such other lands by the exercise of the powers of the before-mentioned Acts. The said sum of 8900*l.* was awarded by the arbitrator in respect of the interest, if any, vested in the respondent under and by virtue of the before-mentioned special proviso in the lease of June 24, 1891, and was calculated on the basis of compensating the respondent for the additional expense which would or might thereafter have to be incurred by him, because the appellants, by taking part of the land referred to in the said proviso, had made it impossible for him thereafter to sink a new pit, if and when required, upon the part of the land so taken. Down to the date of the award no application had been made to the appellants by the respondent to approve any site proposed by him for sinking a new pit, and the only application made to the lessor or his agent was that contained in the letter of May 25, 1898, and the respondent down to the date of the award had never commenced sinking any new pit.

Proceedings were taken by the respondent for the purpose of enforcing the award under s. 12 of the Arbitration Act, 1889, and by the appellants to set aside the award, and ultimately in those proceedings by consent an order was made by a Divisional Court that the award should be considered as amended by the insertion therein of certain facts as agreed and initialled by counsel for both parties and annexed to the award (which facts substantially are stated in this report), and treated as an award stated in the form of a special case.

The Divisional Court gave judgment thereon, holding that the respondent had under the before-mentioned special proviso in the lease a substantial interest which was the subject of compensation under s. 68 of the Lands Clauses Consolidation Act, 1845, and therefore that the award was valid.

J. Lawson Walton, K.C., and *Page, K.C.* (*Howard Wright* with them), for the appellants. The appellants had constructive notice of the lease of June 24, 1891, and no doubt took the land subject to the rights of the respondent under that lease. It is submitted that, nevertheless, under the circumstances the

respondent had no substantial interest, which could be the subject of compensation, in respect of the proviso giving power to sink a pit or pits in the land, the surface of which was taken by the company. By the terms of the proviso, before the right to sink a pit could arise, the lessee had to give notice of his intention to do so to the lessor, his heirs or assigns, his or their agent, and the position of the proposed pit was to be subject to his or their approval. The respondent never did in fact give such a notice as would satisfy the terms of the proviso to anybody, for the letter of May 25, 1898, to the lessor's agent did not specify the exact position of the pit proposed to be sunk. At the time when the compensation was claimed, the appellants were, as equitable owners of the fee, the "assigns" of the lessor, and therefore were the persons to whom notice of the intention to sink a pit would have to be given, and to whose reasonable approval its position would be subject. (1) No application was ever made to them for their approval of any pit. The appellants need not really have given to the respondent any notice to treat at all. They could have determined his tenancy from year to year by notice to quit; and, before he could sink a pit, he would have to give them notice of his intention to sink it; and, upon such a notice being given, they would have reasonable grounds for disapproving of the position of the proposed pit. It is submitted that, the railway company having a statutory right and obligation to make and maintain their railway upon the land in question, it would be perfectly reasonable for them to disapprove of the position of a pit proposed to be sunk in that land. If they are not "assigns" within the meaning of the proviso, it is submitted that the lessor is a trustee for them, and it would be a reasonable ground for his disapproving of the position of the pit that he had sold the land for the purpose of a railway to a railway company, for whom he had become a trustee. No doubt, in determining the question of the reasonableness of a ground for disapproving

(1) The question was raised by the Court whether the appellants had, under the agreement of March 15, 1898, become "assigns" within the meaning of the proviso, and *Gentle* v. *Faulkner*, [1900] 2 Q. B. 267, was referred to; it however became unnecessary for reasons which will appear from the judgments to decide this point.

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of the position of the proposed pit, regard must be had to the balance of convenience or inconvenience as between the parties. If the sinking of the pit at a particular spot would involve great inconvenience or loss to the lessor or his assigns, and the selection of another spot would only involve comparatively moderate inconvenience or loss to the lessee, it would be reasonable for the former to disapprove of the position of a pit proposed to be sunk at the first-mentioned spot. For instance, it would be a reasonable ground of disapproval that the proposed pit was close to a valuable mansion which the lessor had built, or a valuable building site, whereas, if it were proposed to be sunk on the site of a small cottage worth very little, and to sink it elsewhere would involve disproportionate loss to the lessee, disapproval of its position might be unreasonable. In this case it is submitted that the fact that the land was occupied by a railway which the company were authorized and bound under their statutory powers to make would be a perfectly reasonable ground for disapproving of the selection of this land out of the 335 acres for sinking a pit. If the party to whom the lessee had to give notice of his intention to sink the pit, whether the lessor or his assigns, would have a reasonable ground for objecting to the sinking of the pit, the lessee would be unable to sink it, and therefore the right given him by the proviso as regards this land would be valueless, and he would have no substantial interest for which he could be entitled to compensation. If arbitrators were appointed under the lease to determine whether there was reasonable ground for the lessor or his assigns objecting to the sinking of a pit, they would no doubt be bound to consider the convenience or inconvenience to both parties, but the arbitrator in this case seems simply to have considered the inconvenience to the lessee.

[They cited *Treloar* v. *Bigge* (1); *Bates* v. *Donaldson.* (2)]

Cripps, K.C., and *James Fox* (*MacSwinney* with them), for the respondent, were not called upon.

A. L. SMITH M.R. This is an appeal from the judgment of a Divisional Court, consisting of Darling and Bucknill JJ.,

(1) (1874) L. R. 9 Ex. 151. (2) [1896] 2 Q. B. 241.

with regard to the validity of the award of an arbitrator under the Lands Clauses Consolidation Act, 1845. The real question which, in my opinion, arises in this case is whether the arbitrator, to whom the matter was referred, as I will presently explain, had jurisdiction to award any compensation in favour of the respondent. If he had jurisdiction to award anything, the question of amount was for him, and neither we nor any other Court have any jurisdiction to interfere with his award on that question. The facts of the case are shortly these. On June 24, 1891, Colonel Vaughan Lee, who was the owner of a quantity of land amounting to 335 acres in Wales, leased the minerals under the property to the respondent for a term of sixty years. At that time there appears to have been only one shaft by which the minerals could be worked, and a right was given by the lease to the respondent of making another pit or other pits in this piece of land, in order to work advantageously the minerals lying under different parts of the land, at a distance I suppose from the existing shaft. I think there can be no doubt that that right was a very valuable one, and for the loss of the power of exercising it, as regards the piece of land in question, under the following circumstances, the arbitrator has assessed the compensation at the sum of 8900*l.* That lease having, as I have said, been granted in 1891, on March 15, 1898, the appellants, the railway company, entered into an agreement with Colonel Vaughan Lee for the purchase of the surface of about five acres of the land, the minerals under which were leased to the respondent. The appellants then had constructive notice of the lease to the respondent, and the provision in the lease giving him the right to sink another pit or other pits in other portions of the 335 acres. That being so, the appellants on May 25 of the same year gave the respondent notice to treat for whatever interest he might have in the five acres which they were then taking or had taken. One of the rights which he unquestionably had in that land was the right to sink a pit for the purpose of winning the minerals by means thereof. That is an interest which, as I have already said, I cannot doubt to have been a very valuable one, and the amount of the value of which was a question for the arbitrator. The

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matter went to arbitration, and the result was, as I have mentioned, that the arbitrator awarded to the respondent 8900*l.* for the right taken away from him by the appellants, by reason of their having taken, and constructed their railway over, the five acres, wherein he was entitled under the lease to sink a pit for the purpose of working his mine.

It is contended for the appellants that the arbitrator had no jurisdiction to award anything at all to the respondent in respect of that right having been taken away from him. It is said in support of that contention that the respondent had not under the lease an unfettered right to sink a pit in the five acres, because the proviso in the lease, which gives the right, provides that the position of such pit or pits shall be "subject to the reasonable approval of the lessor, his heirs or assigns, or his or their agent for the time being." It was said that, the right being fettered by this condition, the lessor or his assigns might on reasonable grounds disapprove of the sinking of a pit on the five acres in question. I will deal first with the lessor. There is no evidence to shew that there were any reasonable grounds on which he could disapprove of such a pit being sunk. Therefore, so far as he is concerned, the condition imposed by the clause may be put out of the question. Then, with regard to disapproval by his assigns, I will take it for the purposes of this case in favour of the appellants, though it is not necessary to decide the point, that they were within the word "assigns" in the clause. Can it be said to be reasonable on the part of a railway company, because they are a railway company, that they should take the surface of this land, with notice of the respondent's right to sink a new pit therein, and, having constructed their line all over it, then put forward, as a ground for disapproval of the position of any pit proposed to be sunk therein by the lessee, the mere fact that they have done so, and should thus prevent the lessee from sinking a pit on any part of these five acres, and put him to a loss of 8900*l.* by reason of having to sink his pit elsewhere? Speaking for myself, I cannot imagine anything more unreasonable. It seems to me that the arbitrator was within his right in holding that he had jurisdiction to award compensation to the respond-

ent on the ground that, in the circumstances which existed in this case, there was no fetter imposed upon the right given by the proviso to the respondent; because neither the lessor nor the appellants could on any reasonable ground refuse to approve of the respondent's sinking a pit on the five acres in question. With any question as to the amount of the compensation awarded by the arbitrator, as I have said before, in my opinion we have nothing to do. The only question for us is whether he had jurisdiction in law to award compensation. For the reasons which I have given, I think that he had, and therefore that this appeal should be dismissed.

COLLINS L.J. I am of the same opinion. It is admitted by the appellants that they took the surface of the five acres in question subject to the burthen of the conditions in the lease, and I will assume in their favour that, so taking, they are entitled to the benefit of the limitation upon that burthen, and are persons to whose reasonable approval the position of the particular pit proposed to be sunk on the land is subject. That narrows the point down to that which was argued in the Court below, which is simply this, namely, whether the purchasers of a piece of the lessor's land can set up that the purposes for which they intend to use it are such as to make it exceedingly undesirable, from their point of view, not to say impossible, that a pit should be sunk in that piece of land, and that they are thereby, ipso facto and without more, entitled to take the land free from the obligation of paying anything whatever to compensate the lessee for the loss of the right which he otherwise might have had to make a pit in that land. It is obvious that, if such a principle of immunity were admissible, it might have the effect of wiping out the whole obligation under such a covenant in a lease for the benefit of the person who made it. The lessor might the next day after making the lease sell every acre of the land, in respect of which he had undertaken this obligation, for building or other purposes which would render it exceedingly undesirable from the standpoint of the purchasers that a pit should be sunk upon it. It is obvious that that is a consideration which cannot decide this case. The railway

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company were purchasing land which, as matters stood, had no railway upon it, and the necessary steps had to be taken for assessing compensation for all rights injuriously affected by their taking the land under their statutory powers. The lessee had at that moment the right given by the proviso in the lease limited as therein mentioned over the land taken by the appellants, and it became a question what the value of that right was, quite irrespectively of whether the notice mentioned in the proviso had been given or not. The arbitrator had to assess its value, whether any steps had been taken to enforce it or not. He had to consider whether the position was such as to make it necessary or desirable that the lessee should sink a pit there. He had also to consider whether the owner could, when he knew where the lessee desired to sink a pit, reasonably refuse to approve of its position. He had to take all those matters into consideration, and, having done so, to assess the value of the lessee's right. It seems to me that that is what he must be taken to have done here. We are not in a position to inquire into the evidence on which he based his award. We know that he had evidence before him, which might perfectly well have justified his finding that the land taken by the appellants embraced the one place of all others in which it was most desirable or necessary that the lessee should sink a pit in order to work the minerals most advantageously; and we have no reason to suppose that he has not given fair weight to every possible right of objection on the part of the owner of the land. He has assessed a sum of money as compensation for what is primâ facie a substantial claim, and, the arbitrator having assessed that sum of money for what is not a merely nominal but a substantial claim, of course no question can come before us as to the correctness of the amount at which he has arrived. It seems to me therefore that the judgment of the Court below is perfectly right, and I desire to add that I agree, not only with the decision, but also with the reasoning, particularly that of Darling J., in the Court below.

ROMER L.J. I agree. The sole question appears to me to be whether the right of the respondent under the lease to sink

a pit or pits in the land, the surface of which was taken by the appellants, is a substantial interest in that surface. The appellants say that it is not a substantial interest, because under the lease the right could not be exercised at any particular part of the surface in question, if reasonable objection were taken by the lessor, his heirs or assigns, to that part being chosen; and that, upon the appellants choosing to buy the surface in question for the purposes of their railway, it at once became unreasonable that any pit should be sunk anywhere upon it, and so the right given by the lease to the respondent in respect of it was gone, or at any rate became an unsubstantial right. There appears to me to be a fallacy in that contention. The whole point is whether the appellants ought to be allowed to take this surface, and use it for their railway, without compensating the respondent. They say that they ought to be allowed to do so, because, if they once get the land for their railway, then the respondent's right will become extinct or valueless. That shews to my mind how wrong is the position taken up by the appellants. The proper time at which and way in which to look at the respondent's interest is to consider his position before the railway company are allowed to take the land. So considering the matter, it appears to me clear that his interest in this surface was a substantial interest, for which, if the railway company are allowed to take the land freed from his interest, they must make compensation. There is no ground for supposing, as the matter stood before the railway company were allowed to take the land, that any reasonable objection would or could be taken by the lessor, his heirs or assigns, to the respondent's selecting any point in this land for his pit, so that the lessor or his heirs or assigns could say that the respondent never could be allowed to sink his pit on any portion of this particular part of the surface. Test the matter in this way. Suppose that the railway company had chosen to buy the whole of the surface upon which the respondent had a right to sink pits. Could they say to him that they had taken the whole of that surface, and, as they were going to use it for their railway, it had become unreasonable that a pit should ever be sunk on any portion of it, and therefore his

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right was extinguished in their favour, it being no longer reasonable that he should exercise it, and he was to lose it altogether without any compensation? In my opinion, clearly not. It appears to me that the question raised by this case can only be answered in one way, that is, by saying that the interest of the respondent was a substantial one; and it is not our province to inquire into or deal with the amount at which the arbitrator has by his award assessed the value of that interest. In the view we have taken of the case, there is no need to consider the question which was raised as to whether the appellants were "assigns" of the lessor within the meaning of the proviso.

Appeal dismissed.

Solicitor for appellants: *R. R. Nelson.*

Solicitors for respondent: *Bell, Brodrick & Gray, for Linton & Kemshole, Cardiff.*

E. L.

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[IN THE COURT OF APPEAL.]

LUDBROOK *v.* LUDBROOK.

Limitation, Statutes of—Real Property—Mortgagee—Entry or Action within Twelve Years after last Payment of Interest—Real Property Limitation Act, 1837 (7 *Will.* 4 *and* 1 *Vict. c.* 28).

The Real Property Limitation Act, 1837, which provides that a person entitled to or claiming under a mortgage of land may make an entry or bring an action at law or suit in equity to recover such land at any time within twenty [now twelve] years next after the last payment of any part of the principal or interest secured by such mortgage, applies, not only as against the mortgagor and persons claiming under him, but also as against a person who has acquired a good title by virtue of the Statute of Limitations as against the mortgagor and those claiming under him.

APPLICATION by the defendant for judgment or a new trial in an action tried before Grantham J. with a jury.

The action was to recover possession of a dwelling-house and premises known as Eagle House.

Judgment had been entered for the plaintiff on the trial.

The facts and arguments sufficiently appear for the purposes of this report from the judgment. (1)

McCall, K.C., and *Younger, K.C.* (*Lawless* with them), for the defendant.

Foote, K.C., and *H. Terrell, K.C.* (*A. B. Shaw* with them), for the plaintiff.

[The following authorities were referred to in the argument: *Doe* v. *Eyre* (2); *Doe* v. *Massey* (3); *Pugh* v. *Heath* (4); *Thornton* v. *France*. (5)]

Cur. adv. vult.

March 29. ROMER L.J. read the judgment of the Court (A. L. Smith M.R., Collins L.J., and Romer L.J.) as follows:— The only question that arises for our determination on this appeal is whether the plaintiff is entitled to recover from the defendant possession of the house and premises known as Eagle House.

The plaintiff claims to have acquired as against the defendant a good title to the property under the Statute of Limitations, 3 & 4 Will. 4, c. 27, as altered by the Act 37 & 38 Vict. c. 57. Apart from the operation of these Acts, it is clear that the plaintiff has no title to the premises.

To the plaintiff's claim several defences have been raised, but there is one short answer on the part of the defendant which renders it unnecessary for us to consider the other points taken by him. He is a mortgagee of the premises, and he claims the benefit of the statute 7 Will. 4 and 1 Vict. c. 28 (6), as altered

(1) Many complex and difficult points were argued as to the operation on the facts of the case of various sections of the Real Property Limitation Act, 1833, but these were not decided, as the case was ultimately held to turn only on the Real Property Limitation Act, 1837. The case is merely reported as shewing the adoption by the Court of Appeal of the view of the latter statute taken by the Queen's Bench in *Doe* v. *Eyre*, (1851) 17 Q. B. 366, as now being settled law. It has therefore been thought unnecessary to set out the facts and arguments further than as appearing in the judgment.

(2) 17 Q. B. 366.

(3) (1851) 17 Q. B. 373.

(4) (1882) 7 App. Cas. 235.

(5) [1897] 2 Q. B. 143.

(6) 7 Will. 4 and 1 Vict. c. 28: "Whereas doubts have been entertained as to the effect of a certain Act of Parliament made in the third and fourth years of his late Majesty King

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by the statute 37 & 38 Vict. c. 57, s. 9. We think that this claim on his part is good and affords a complete answer to the plaintiff's case.

The circumstances of the case, so far as necessary to be stated to shew how the point we are now dealing with arises, are as follows. The premises, together with others, were held by the father of the plaintiff and defendant under a lease for a long term of years which will not expire until the year 1922. In his lifetime the father mortgaged the lease to secure certain sums of money advanced to him. First, in 1876 he mortgaged it by deed by which the leasehold premises were demised and assigned to the mortgagee for the whole term except the last day, and, secondly, in 1882 he mortgaged it by deed by which the leasehold premises were assigned to the second mortgagee for the whole term subject to the first mortgage. The father died on January 1, 1885, having by his last will bequeathed the lease to two trustees in trust to secure an annuity given to his widow for her life, and after her death an annuity given to his daughter, the plaintiff, for her life, and subject thereto in trust for the defendant. After the testator's death the widow was allowed to reside during her lifetime in Eagle House under circumstances which we should have had carefully to consider but for the point now being dealt with. On December 1, 1888, the defendant, in consideration of his payment to the executors of the second mortgagee of the sum then owing on the second mortgage, obtained a transfer to himself of the mortgage debt and security; and on January 27, 1893,

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William the Fourth, intituled 'an Act for the limitation of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto,' so far as the same relates to mortgages; and it is expedient that such doubts should be removed: Be it declared and enacted that it shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said Act, to make an entry or bring an action at law or suit in equity to recover such land at any time within twenty" [now twelve] "years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty" [now twelve] "years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in the said Act notwithstanding."

in consideration of his payment to the first mortgagee of the sum then owing on the first mortgage, the defendant obtained a transfer of that mortgage debt and security. In 1894 the defendant purchased and had conveyed to him the reversion, subject to the lease, in the leasehold premises. In July, 1899, the widow died, having by will bequeathed all her property to the plaintiff. The plaintiff, who had been living with her mother, continued to reside at Eagle House until December 27, 1899, when the defendant took possession, and excluded the plaintiff. The plaintiff thereupon brought this action.

In the course of the argument before us it was admitted on behalf of the plaintiff that, at any rate up to the dates of the transfers of the mortgages to the defendant, interest on the mortgages respectively had been duly paid by the mortgagor and his assigns within the meaning of 7 Will. 4 and 1 Vict. c. 28. That being so, twelve years had not elapsed since the last payment of interest when the defendant took possession of Eagle House. It is also clear that the mortgages are still in existence, and have not been merged or extinguished. That being so, the defendant is in a position to avail himself of the benefit of the statutes to which we have referred.

It is said on behalf of the plaintiff that the defendant did not take possession of the premises in his character of mortgagee; but, even if the defendant did not originally intend to take possession as mortgagee, it is quite open to him by his defence to justify the taking of possession in his capacity of mortgagee as against the plaintiff, who seeks to treat him as a trespasser.

The next point taken on behalf of the plaintiff is that, inasmuch as she had acquired under the Statute of Limitations a good title against the defendant in his capacity other than that of mortgagee, he was barred as mortgagee by virtue of s. 20 of the Act 3 & 4 Will. 4, c. 27. But, even if s. 20 applies to any concurrent right other than one in respect of a future estate or interest, yet in the present case the section cannot apply. The defendant was not in the position of the mortgagor. The trusts upon which the lease, subject to the mortgages on it, was held by the trustees of the father's will were still existing. The defendant had no estate in possession other than

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his estate as mortgagee, and he had no right, apart from his right as mortgagee, to make an entry or distress, or bring an action to recover the land within the words of the section. In short, he never came within the operation of the section at all.

Lastly, it was said on behalf of the plaintiff that the statute 7 Will. 4 and 1 Vict. c. 28, only applies to proceedings between mortgagor and mortgagee. But the statute is not in terms limited to such proceedings: and it has been held in several cases not to be so limited. If the mortgage be an existing one and was executed before the commencement of the possession of the person claiming to have acquired a title by such possession under the Statute of Limitations, then the statute 7 Will. 4 and 1 Vict. c. 28, undoubtedly applies in favour of the mortgagee, although the person in possession may have acquired a good title as against the mortgagor and those claiming under the mortgagor: see *Thornton* v. *France* (1), a decision of the Court of Appeal, where the earlier authorities are considered. In the present case the mortgages were executed before the commencement of the possession of the widow, and are valid and subsisting mortgages, and there are no circumstances existing which prevent the defendant from claiming the benefit of the statute as against the plaintiff. This point being decided in favour of the defendant, the plaintiff's case fails, and we need not consider the other defences raised by the defendant.

Judgment for defendant.

Solicitors for plaintiff: *Parson, Lee & Co.*
Solicitor for defendant: *H. M. Sandom.*

(1) [1897] 2 Q. B. 143.

E. L.

THE ATTORNEY-GENERAL AND THE BROMLEY RURAL DISTRICT COUNCIL *v.* COPELAND.

1901
Jan. 17;
April 1, 3.

Prescription—Drain—Acquisition of Easement by Public—Highway Act, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 67.

The highway authority of a rural district had for upwards of twenty years maintained a pipe running from a highway through a bank which divided the highway from the defendant's land adjoining, and had during that period caused the rain water collecting upon the highway to be discharged through the pipe on to the defendant's land. The water on leaving the pipe did not fall into any channel, but simply spread over the surface of the land. The defendant having obstructed the pipe, the highway authority and the Attorney-General claimed an injunction to restrain the defendant from continuing the obstruction on the grounds: first, that from their long enjoyment of the pipe it ought to be inferred that the highway authority had by agreement with the owner of the adjoining land acquired a right to keep open the pipe under s. 67 of the Highway Act, 1835; and, secondly, that the public, as occupiers of the surface of the highway for the statutory period, had acquired a prescriptive right to the easement of discharging the water on to the defendant's land.

Held, (1) that the pipe, being unconnected with any outfall channel, was not a drain within the meaning of s. 67 of the Highway Act, and that that section had consequently no application; and (2) that the public right of passage was not such a right as was capable of having the easement claimed attached to it.

FURTHER CONSIDERATION before Lord Alverstone C.J.

The plaintiffs, the Bromley Rural District Council, are the highway authority for the parish of West Wickham, in the county of Kent, and the defendant is the owner of certain land in the parish adjoining a highway within the jurisdiction of the plaintiff council, and separated from the highway by a bank. This highway, at the point where it adjoins the defendant's land, has a rising gradient in each direction, and the rain and storm water falling on the road naturally flowed down from each direction to the point opposite the defendant's land, which point is in the judgment referred to as the point E, and there fell into two catch-pits, one on each side of the road. These two catch-pits were connected by means of a pipe under

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the road, and the whole of the water ultimately found its way into the catch-pit next the defendant's land, which was at a lower level. For more than twenty years before action the plaintiff council and their predecessors had maintained and kept open a pipe through the bank, and had caused the overflow of the catch-pit to be discharged on to the defendant's land, from which point the water flowed away over the surface of the defendant's land, and not in any defined channel. The defendant, who is a builder, had bought the land in question about two years before action brought, and, having erected some houses and laid out gardens upon it, he blocked up the end of the pipe so as to prevent the continuance of the flow of the water over his land. Thereupon the plaintiff council and the Attorney-General, on the relation of the council, claimed an injunction to restrain the defendant from maintaining the obstruction.

Bray, K.C., and *Clarke Williams*, for the plaintiffs. The discharge of the water having been enjoyed by the plaintiffs for upwards of twenty years, they have acquired a right to continue it. By s. 67 of the Highway Act, 1835, the surveyor of highways, who in the present case is represented by the plaintiff council, has "power to make scour cleanse and keep open all ditches gutters drains or watercourses . . . . in and through any lands or grounds adjoining or lying near to any highway upon paying the owner or occupier of such lands or grounds, provided they are not waste or common, for the damages which he shall sustain thereby." That section gives a right to make a drain and acquire an easement to get rid of the water from the road by pouring it upon the adjoining owner's land. Here the pipe, being made through the defendant's bank, is a drain through land adjoining the highway within the meaning of the section. It cannot make any difference that there is no ditch or channel to receive the water on the other side of the bank: that fact could only affect the amount of the compensation. From the long enjoyment it is to be inferred that the pipe was made under that section, and the compensation duly paid to a former owner of the land. Secondly, the public have acquired

a prescriptive right to discharge the water as appurtenant to their interest in the highway. The public's right in respect of a highway is more than a mere easement or right of passage: it is in the nature of occupation. Lord Cairns in *Rangeley* v. *Midland Ry. Co.* (1) said: "A public road or highway is not an easement: it is a dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing, the public generally taking upon themselves (through the parochial authorities or otherwise) the obligation of repairing it." That occupation is capable of being a dominant tenement to which such a right as that which is here claimed is capable of being annexed. But if the owner of the adjoining land, and not the public, is to be regarded as in occupation of the soil of the highway, then inasmuch as some of the water which passed through the pipe came from the further side of the road, the owner of the land on that side had acquired a right to get rid of his storm water through the pipe, and he had acquired that right for the benefit of all who had any interest in the highway, including the public: *Ivimey* v. *Stocker*. (2)

Dickens, *K.C.*, and *Rashleigh*, for the defendant. The pipe is not a drain within the meaning of s. 67 of the Highway Act, 1835; therefore that section does not apply. A pipe used to carry off surface water cannot be regarded as a drain unless it discharges into a sewer or other defined outfall channel. In *Croft* v. *Rickmansworth Highway Board* (3), where waste water flowed through pipes into a dumb-well from whence it percolated into the soil, it was held that the defendants were not authorized under that section to clean out the dumb-well and the drain-pipes connected with it as part of their drainage system. The discharge into the dumb-well in that case corresponded to the discharge on to the surface of the defendant's land in the present.

As to the claim of an easement on behalf of the public, there can be no easement where there is no dominant tenement. And the public have no right of property in the road which can

(1) (1868) L. R. 3 Ch. 306, at p. 311. (2) (1866) L. R. 1 Ch. 396.
(3) (1888) 39 Ch. D. 272.

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constitute a dominant tenement. They have a mere right to pass and repass, and no easement can be attached to such a right.

Clarke Williams, in reply.

Cur. adv. vult.

April 3. LORD ALVERSTONE C.J. In this case the Attorney-General (acting on the relation of the Bromley Rural District Council) and the Bromley Rural District Council have brought an action against the defendant in respect of the interference with the flow of water through a certain pipe which had been put through the bank of the defendant's land. It was not denied that the defendant had obstructed the flow, and the only question for my determination is whether the Attorney-General on the relation of the plaintiff board or the plaintiff board itself is entitled to an injunction to restrain the defendant from interfering with the flow of water through the pipe in question.

The point of law raised is somewhat novel. It will be convenient, in the first instance, that I should state the facts which gave rise to it. There is in the district of the Bromley Rural District Council a road which passes from the Swan Inn at West Wickham north-west in the direction of Beckenham. It was not disputed that the road was an ancient highway. The road near the point as to which the question arises passes to the south-west of West Wickham Station, and runs approximately parallel to the railway, which is in a cutting some little distance to the east.

I find upon the evidence before me that prior to the year 1868 there were at the point marked E on the Ordnance plan, which was produced in evidence in this case, two old catch-pits, one on either side of the road, connected by an old pipe or culvert under the road. There is a falling gradient from the south for a distance of upwards of a quarter of a mile to the point E about 1 in 25, and a rising gradient from the point E towards the north-west having a fall of about 1 in 400. The point E is in consequence the lowest point in the road at that point, having gradients rising from it in each direction. In addition, the natural lie of some part of the land on the west is

towards the road. Prior to the year 1868, the water collecting on the road and running down each gradient in both directions and collecting at the point E would find its way into the two old catch-pits, and from the western catch-pit by means of the pipe under the road to the eastern catch-pit, and thence to an old cut in the bank. In the year 1868 the old catch-pit on the west was enlarged, and a new catch-pit put on the east side, and the catch-pits were connected by an iron pipe, and from the eastern catch-pit stone pipes of twelve inches diameter and some five or six feet in length in all were put through the bank. Under these circumstances, I come to the conclusion that there was sufficient evidence to establish the existence of an easement for the pouring of water through the pipe on to the land of the defendant if it had been enjoyed by a private individual in connection with a proper dominant tenement.

I have now to consider whether the Bromley Rural District Council, or the Attorney-General on their relation, can enforce, as against the defendant, the right to continue the flow of water through the pipe in question. It is urged by the plaintiffs that, inasmuch as under s. 67 of the Highway Act, 1835, a surveyor of highways could make drains through adjoining grounds upon payment of compensation to the owners, this pipe through the bank was in fact a drain, and that I must assume after the uninterrupted user of so many years that there has been some arrangement between the adjoining owner and the relators, or their predecessors, under that section.

That section formed the subject of discussion in the Court of Appeal in *Croft* v. *Rickmansworth Highway Board.* (1) That case is not decisive of the point raised before me, inasmuch as no question of prescription was there discussed; but I think that the judgments of the Court of Appeal shew that the only rights which could be lawfully acquired by a surveyor of highways are rights which come within the words of the section. I am of opinion that this pipe through the hedge is not a drain within the meaning of that section. It is true it may be said to drain the water off from the road; but, on the other hand, it is only a means whereby water is poured from the road on to the

(1) 39 Ch. D. 272.

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surface of the adjoining land; and, in my opinion, it is not a drain such as is contemplated by that section, which I understand to be a drain or watercourse for the conveyance of water to some proper outlet.

In addition to claiming by virtue of that section, the plaintiffs also based their claim upon prescription, on the ground that the public, as the occupiers of the road, had for more than the statutory period enjoyed the privilege of pouring out the water from the pipe; and they cited a passage from the judgment of Lord Cairns in *Rangeley* v. *Midland Ry. Co.* (1) as supporting the view that a right of way is not an easement, and, therefore, the surface of the road was in the occupation of the persons using the road. In my opinion, this contention of the plaintiffs cannot be supported. In order to found a claim to an easement of this character there must be a dominant tenement to which the easement can be attached. I can find no authority for the suggestion that a right of way can be considered to be such a dominant tenement for the purpose of having such a right attached to it, and there seem to me to be great difficulties in coming to that conclusion.

I think that the relators have not on either ground acquired a legal right to have this particular pipe maintained, and thereby to discharge water upon the defendant's land; and for these reasons I am of opinion that the action fails.

Judgment for the defendant.

Solicitors for plaintiffs: *May, Sykes & Co.*
Solicitor for defendant: *A. Pearce.*

(1) L. R. 3 Ch. 306, at p. 311.

J. F. C.

ANDERSON *v.* COLLINSON.

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April 17.

Estoppel — Res Judicata — Affiliation Proceedings — Paternity of Child — Judgment of Quarter Sessions—Action for Seduction.

In affiliation proceedings against the defendant he appealed to quarter sessions against an order of justices adjudging him to be the father of A.'s illegitimate child, and the court of quarter sessions quashed the order on the ground that he was not the father. Subsequently an action for damages for the seduction of A. was brought by her mother against the defendant:—

Held, that the plaintiff in the action was not estopped by the decision of the court of quarter sessions from alleging that the defendant was the father of the child.

APPLICATION for judgment for the defendant, or a new trial, in an action remitted to the Darlington County Court.

The action was to recover damages for the seduction of the plaintiff's daughter, Sarah Ann Anderson, who had borne an illegitimate child of whom the defendant was alleged to be the father.

Before the commencement of the action Sarah Ann Anderson had taken affiliation proceedings against the defendant in respect of the birth of the child, and had obtained an order of justices for the borough of Richmond, Yorkshire, at petty sessions, adjudging him to be the father, and ordering him to pay 5*s*. a week for the maintenance of the child until it attained the age of fourteen.

The defendant appealed against this order to the court of quarter sessions for the borough of Richmond, and on the hearing of the appeal the recorder of Richmond allowed it, and quashed the justices' order, saying that, after hearing the evidence given on behalf of the appellant, he felt bound to come to the conclusion that the appellant was not the father of the child.

Subsequently the action for seduction was brought, and at the trial in the county court, with a jury, it was contended on behalf of the defendant that the plaintiff was estopped by the order of the court of quarter sessions from alleging that the defendant was the father of the child.

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The county court judge overruled this objection, and left the case to the jury, who gave a verdict for the plaintiff with damages, 250*l.*, and judgment was entered for her accordingly.

Manisty, K.C., for the defendant. The order of quarter sessions estopped the plaintiff from setting up in the action in the county court that the defendant was the father of the child. That order was a judgment in rem, and is conclusive in all proceedings in which it is sought to establish that he is the father: *Thornton* v. *Pickering* (1), cited with approval by Holt C.J. in *Rex* v. *Rislip* (2); *Reg.* v. *Glynne.* (3)

Compston, for the plaintiff. There is no estoppel here. The order of the court of quarter sessions is not a judgment in rem. The parties were not the same, nor their rights the same, in the action for seduction as in the affiliation proceedings. A petition for divorce has often been presented after an action for crim. con. has been tried, and in the proceedings for divorce the judge has held that he was not bound by the decision in the action: see *Evans* v. *Evans* (4); *Jenkyn* v. *Jenkyn.* (5) *Reg.* v. *Glynne* (3) only decided that after the order of quarter sessions in favour of the alleged father the girl could not take fresh affiliation proceedings before the justices. In an action for seduction, the issue with respect to the paternity of the child is tried in a different way, because it is sufficient for the quarter sessions to say that the girl's evidence was not corroborated as the statute requires.

[He also referred to *Brunsden* v. *Humphrey.* (6)]

Manisty, K.C., replied.

LORD ALVERSTONE C.J. In this case there is an application by the defendant for judgment, or a new trial, in an action remitted to the county court. The action was for the seduction of the plaintiff's daughter, and one of the grounds of the application is that at the trial evidence was tendered for the defendant, and admitted, that in affiliation proceedings taken by the daughter against him the quarter sessions had made a final

(1) (1673) 1 Freem. 282.
(2) (1698) 1 Ld. Raym. 394.
(3) (1871) L. R. 7 Q. B. 16.
(4) (1844) 1 Rob. 165.
(5) (1856) 5 W. R. 43.
(6) (1884) 14 Q. B. D. 141.

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order dismissing those proceedings. It was contended before us by counsel for the defendant that the decision of the quarter sessions must be regarded as a decision in rem, and that by reason of it the plaintiff in the action was estopped from saying that the defendant was the father of her daughter's child. I am of opinion that we cannot interfere to give judgment for the defendant, or grant a new trial. It was no doubt held in *Reg.* v. *Glynne* (1) that the decision of quarter sessions, quashing an affiliation order made by justices on the ground that there was no corroboration as required by the statute, was final to this extent—that no fresh proceedings could be taken before the justices against the person in whose favour the order of quarter sessions was made; and I must not be taken as expressing an opinion that there would be no estoppel here, if some action could be and had been brought by the daughter in which she sought to fix the paternity of the child upon the defendant. But the action here has been brought by the mother for the loss of her daughter's services. It is impossible to say that the parties are the same as in the affiliation proceedings, or that the ordinary rule with respect to estoppel does not apply. I do not think that the decision in *Reg.* v. *Glynne* (1) meant that the order of quarter sessions was a judgment in rem binding upon all the world, but only that it was a judgment which was final and conclusive between the parties to the affiliation proceedings—that is, between the girl and the man.

I am, therefore, of opinion that our judgment should be for the plaintiff.

LAWRANCE J. I am of the same opinion, and for the same reasons.

Judgment for the plaintiff.

Solicitor for plaintiff: *A. Toovey, for Edmundson & Gowland, Masham.*

Solicitors for defendant: *Iliffe & Co., for T. N. Barron & Smith, Darlington.*

(1) L. R. 7 Q. B. 16.

W. A.

1901
April 1, 19.

WILTON & CO. *v.* OSBORN.

Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 1—*Reopening of Transaction —"Harsh and Unconscionable Transaction."*

By s. 1, sub-s. 1, of the Money-lenders Act, 1900, where proceedings are taken in any court by a money-lender for the recovery of money lent after the commencement of the Act, and there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, and that, in either case, the transaction is "harsh and unconscionable, or is otherwise such that a Court of Equity would give relief," the Court may reopen the transaction and give relief to the person sued:—

Held, that the words "or otherwise is such that a Court of Equity would give relief" are not exclusive of the words "harsh and unconscionable," and that in order to entitle the person sued to relief the transaction must be such that a Court of Equity would relieve against it on the ground of its being harsh and unconscionable.

ACTION tried before Ridley J. without a jury.

The action was brought by a firm of money-lenders to recover 56*l.*, the amount of a promissory note given by the defendant to the plaintiffs. It appeared that in 1897 the defendant borrowed from the plaintiffs 40*l.*, for which he gave them a promissory note at three months' date; the note had been renewed fourteen times, each time at a cost of 6*l.* to the defendant. The defendant being desirous of making arrangements for paying off the amount of the loan, negotiations took place between the parties, as a result of which the defendant gave the plaintiffs a promissory note for 56*l.* payable in four quarterly instalments, by which in default of payment of any one instalment the whole remaining balance was immediately to become due and payable. The first instalment not having been paid when due, the present action was brought to recover the amount of the note. The defendant asked for relief under s. 1 of the Money-lenders Act, 1900.

Willes Chitty, for the defendant. The transaction is harsh and unconscionable, and the Act does not limit the meaning of

those words to harsh and unconscionable transactions against which a Court of Equity would give relief. This is apparent from the provision in s. 1, sub-s. 7, that in the application of the Act to Scotland the section is to be read as if the words "or is otherwise such that a Court of Equity would give relief" were omitted. The Act was intended to relieve borrowers against excessive claims by money-lenders, and if it does not apply to cases in which a Court of Equity would not give relief, it is, so far as this section is concerned, practically useless. The words "or otherwise" are equivalent to "for some other reason," and the section means that the Court may set aside a harsh and unconscionable bargain, whatever may be the equity doctrine on the subject. The decisions on the equitable doctrine of granting relief from unconscionable bargains are summed up in *Nevill* v. *Snelling* (1), the real question in every case being, as stated by Denman J. (2), whether the dealings have been fair, and whether undue advantage has been taken by the money-lender of the weakness or necessities of the person raising the money. The mere fact that the interest is excessive is no doubt insufficient to entitle the borrower to relief under the section, and the transaction must be in other respects harsh and unconscionable; the present transaction satisfies the section, for it must be harsh and unconscionable to insert a default clause, the effect of which is that on default in payment of the full amount of a single instalment the whole sum, together with interest for a year, becomes immediately payable. The use of the words "or otherwise" shews the view of the Legislature to have been that the fact that a transaction was harsh and unconscionable was one of the grounds on which a Court of Equity would grant relief.

Lawson Walton, K.C. (*Lowenthal*, with him) for the plaintiffs. It is admitted that a Court of Equity would relieve against a transaction on the ground of its being harsh and unconscionable. But in the view of equity the meaning of an "unconscionable" transaction applies only to such cases as where one party abuses the relationship existing between himself and the other, for instance, the relationship of solicitor and

(1) (1880) 15 Ch. D. 679. (2) 15 Ch. D. at p. 703.

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client, or where one party takes advantage of the fact that the other is an expectant heir or has just come into a large estate; the mere fact that the borrower is extravagant and foolish and the interest charged usurious is, as was recognised by Denman J. in *Nevill* v. *Snelling* (1), not enough to entitle the borrower to relief. There was nothing in the present case to shew that the defendant was not free to borrow the money or not as he pleased. The exclusion in the case of Scotland by s. 1, sub-s. 7, of the words "or is otherwise such that a Court of Equity would give relief" was for the simple reason that they were unnecessary, there being no courts of equity in that country. The default clause was a necessary incident in such a contract as the present, where the promissory note was the only security for the loan. [He cited *Middleton* v. *Brown* (2); *Bennet* v. *Bennet*. (3)

Willes Chitty, in reply. The granting of relief by a Court of Equity depends upon the circumstances of the particular case, and the circumstances here shew that the parties were not on equal terms and that the transaction was harsh and unconscionable.

Cur. adv. vult.

1901. Judgment was delivered by

RIDLEY J. [The learned judge, having stated the facts, read the following written judgment:—] From these facts it appears to me that the interest charged in respect of the transaction now sued upon must be regarded as excessive, and that the whole transaction was, in the sense that the charges made were excessive and extortionate, harsh and unconscionable. As to the original note and the renewals of it, I am not sure that the charges then made would properly be so described although the interest did amount to 60 per cent; "excessive" means excessive with regard to the circumstances, and here the defendant was not in a position to pay the amount advanced, nor was there any security for its repayment. But it is not necessary to decide that point, thinking as I do about the note subsequently taken and now sued upon.

(1) 15 Ch. D. 679. (2) (1878) 47 L. J. (Ch.) 411.
(3) (1876) 43 L. T. 246, n.

It is now contended that, under s. 1 of the Money-lenders Act, 1900, the Court has power to reopen the transaction and order an account to be taken, or in some other way grant relief to the defendant, and as the point is, I believe, a new one, I took time to consider my decision.

It appears to be established by a series of decisions that a Court of Equity will not grant relief in such cases merely because the charges or interest are excessive. Every case has, indeed, to be judged by its own circumstances; but unless the borrower be of the class known as expectant heirs (which requires distinct consideration) the rule is that, assuming him to be of full capacity, relief will not be granted unless it can be shewn that he has been overreached, tricked, or deceived, and that the money-lender has taken an unfair and undue advantage of his weakness and necessities. The general rule is that neither excess of interest nor exorbitance of charge will suffice unless the element of unfair dealing is found to have existed. The authorities for this principle are fully set out in the judgment of Denman J. in *Nevill* v. *Snelling* (1), and I do not think it necessary here to go through them. That case was decided in 1880, and I have not been able to find a later decision which in any way alters the conclusions which, I agree, result from the authorities there quoted.

On an analogous subject, indeed, that of voluntary donations alleged to have been made under undue influence, the case of *Allcard* v. *Skinner* (2) may be referred to. In that case Lindley L.J., in classifying the cases of that kind in which the Court will invalidate the gift, says (3): "First, there are the cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor." And again he says (4): "What then is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? or is it that it is right and expedient to save them from

(1) 15 Ch. D. 679.
(2) (1887) 36 Ch. D. 145.
(3) 36 Ch. D. at p. 181.
(4) 36 Ch. D. at p. 182.

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being victimised by other people? In my opinion the doctrine of undue influence is founded upon the second of these two principles. Courts of Equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of donors. The Courts have always repudiated any such jurisdiction. *Huguenin* v. *Baseley* (1), is itself a clear authority to this effect. It would obviously be to encourage folly, recklessness, extravagance, and vice, if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions, or by bestowing it on less worthy objects. On the other hand, to protect people from being forced, tricked, or misled in any way by others into parting with their property is one of the most legitimate objects of all laws." That case, no doubt, is not in point on the present occasion, but was decided upon a subject analogous to this (see *Lord Aylesford* v. *Morris* (2), per Lord Selborne), and it shews that in setting aside of gifts, as also in relieving from bargains for the repayment of loans, equity considers not improvidence, folly, and imprudence, nor harshness of terms, but unfairness, overreaching, or coercion to constitute a proper ground for its interference. Thus it seems to me clear that this case is not one of those in which a Court of Equity would have interfered. The defendant was not overreached, nor was advantage taken of his necessities; he exercised his own volition, and he made terms. The bargain was improvident and foolish, but no pressure was put upon him which can be called undue or unfair. Therefore he would not have obtained relief in a Court of Equity apart from the recent statute. (3)

But it was contended that this Act of Parliament had altered and extended the rule previously laid down by the Courts. First, it was said that some amendment was intended because of the very title of the Act—"An act to amend the law with respect to persons carrying on business as money-lenders." But there are amendments of the law contained in the Act,

(1) (1807) 14 Ves. 273; 9 R. R. 148.
(2) (1873) L. R. 8 Ch. 484, 491.
(3) [Cp. *Mackintosh* v. *Wingrove*, decided on the same principles by the High Court of Calcutta in 1878, 1 L. R. 4 Cal. 137.—F. P.]

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even if there were none in this respect, quite sufficient to satisfy the title. It is not necessary to enumerate them, but the registration of money-lenders would be one, and it seems to me that an enactment directing all Courts to apply doctrines peculiar hitherto to the Courts of Equity is clearly an amending enactment.

Secondly, it was argued that the language of s. 1 properly bears the meaning contended for. [The learned judge read the section.]

In the first place, in order to make the Act applicable, there must be evidence to satisfy the Court either that the interest or that the charges made are excessive; and there must, in the second place, be also evidence that the transaction is harsh and unconscionable, or is otherwise such that a Court of Equity would give relief. Excessive interest or charges will not of themselves suffice; there must be, besides, something harsh or unconscionable, or such circumstances as would afford ground for a claim for relief from a Court of Equity. It was argued that the words "harsh and unconscionable" must be used in a different sense than heretofore because the following words—"or is otherwise such that a Court of Equity would give relief"—would of themselves include every case in which that Court has hitherto acted; in other words, that the second clause is exclusive of the former, and is intended to cover all cases in which such a Court would give relief, while the former clause is intended to include other cases in which hitherto it would not have given relief, and by consequence such a case as the present. Some reliance, in support of this view, was placed on sub-s. 7 of this same section, by which in Scotland this section is to be read as if the words "or is otherwise such that a Court of Equity would give relief" were omitted. It was said that, unless the words "harsh and unconscionable" were read as suggested, Scotland would reap no benefit from the new law. But sub-s. 7 was obviously inserted because in Scotland there is no Court of Equity distinguished from the general jurisprudence of the country, and it seems to me that it might quite as well be argued that their omission in the case of Scotland is of little importance, because by their insertion in the case of

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England it was only intended to include some other particular case of relief granted by the Court which could not be classed under the general head of harshness or unconscionability. Such, for instance, was the case of *Gordon* v. *Street* (1), which, however, was decided on the ground of fraudulent concealment, the contract having been repudiated as soon as the fraudulent concealment was discovered. But the sense so contended for does not appear to be the natural sense of the words used, in which sense they must, if possible, be construed. Read in that sense, the section includes all cases where the charges or interest are excessive, and where there has been conduct for which, as harsh, unconscionable, or unfair, a Court of Equity would give relief. The words from "or otherwise" onwards are in fact added to give completeness to the definition. So far as regards England, it was possible, and indeed desirable, to add them; but so far as Scotland is concerned, the definition was complete without them.

Judgment for the plaintiffs.

Solicitor for plaintiffs: *Isadore Goldman.*

Solicitors for defendant: *Collyer-Bristow, Hill, Curtis & Dods, for Langley & Tweed, Lincoln.*

(1) [1899] 2 Q. B. 641.

W. J. B.

THE KING *v.* ROBERTS.

1901
April 17.

Weights and Measures—Verification and Stamping—Fees—Inspector, Duty of, to take Fees—Weights and Measures Act, 1889 (52 & 53 *Vict. c.* 21), *s.* 13.

By s. 13 of the Weights and Measures Act, 1889, "an inspector of weights and measures may take in respect of the verification and stamping of weights, measures, and weighing instruments the fees specified in the First Schedule to this Act, and no others":—

Held, that this enactment was obligatory, imposing upon the inspector a duty to take the fees in all cases.

RULE for a writ of certiorari, obtained on behalf of Thomas Kyle, an inspector of weights and measures for the administrative county of Buckingham, to bring up and quash a surcharge made upon him by J. H. K. Roberts, the district auditor for the eastern counties audit district.

The facts upon which the rule was granted were set forth in an affidavit made by the applicant, and were admitted.

The applicant was employed by the Bucks County Council as an inspector of weights and measures, under the Weights and Measures Acts, 1878 (41 & 42 Vict. c. 49), and 1889 (52 & 53 Vict. c. 21).

In November, 1898, the Bucks County Council duly passed a resolution "that the fees for verification and stamping of weights, measures, and weighing instruments charged under s. 13 and the First Schedule of the Weights and Measures Act, 1889 (1), shall cease to be taken in this county on and after January 1, 1899." In consequence of that resolution, and

(1) 52 & 53 Vict. c. 21, s. 13, sub-s. 1: "An inspector of weights and measures may take in respect of the verification and stamping of weights, measures, and weighing instruments the fees specified in the First Schedule to this Act, and no others, and no discount shall be allowed, and such inspector shall at such times, not less often than once a quarter, as the local authority direct, account for and pay over to the local authority, or as they direct, all fees so taken."

First Schedule: "Fees to be taken on the Verification and Stamping of Weights, Measures, and Weighing Instruments by Inspectors of Local Authorities."

[The sums to be taken as fees in respect of different weights and measures are then specified.]

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acting upon the instructions of the county council, the applicant ceased on and after January 1, 1899, to take any of those fees. Upon the audit of the accounts for the year ending March 31, 1900, the district auditor for the eastern counties audit district surcharged the applicant with the sum of 1*l.* 11*s.* 4*d.*, representing fees which the applicant would have collected but for the resolution of the county council, and the consequent instructions given to him by them, but which he never in fact collected or received.

This rule was thereupon obtained.

C. A. Russell, K.C., for the auditor, now shewed cause. Three grounds of objection to the surcharge are mentioned in the rule—first, that s. 13 of the Weights and Measures Act, 1889, imposes no obligation upon the inspector to take any fees at all; secondly, that he was justified in not taking the fees by the direction of the county council, whose agent he was; and, thirdly, that he cannot be surcharged in respect of sums which he has never collected or received. As to the two first grounds, s. 13 imposes an absolute obligation upon him to take the fees. The word "may" in that section means "must." Sect. 43 of the Weights and Measures Act, 1878, provides for the appointment by local authorities of inspectors of weights and measures "for safely keeping the local standards provided by such authority, and for the discharge of the other duties of inspectors under this Act." Sect. 47 enacted: "An inspector under this Act may take in respect of the verification and stamping of weights and measures such fees not exceeding those specified in the Fifth Schedule to this Act as the authority appointing him from time to time fix," and he is to account for and pay over all fees taken by him as the section directs. Sect. 47 is repealed by the Act of 1889 and replaced by s. 13, which takes away the discretion of the local authority to alter or vary the fees. The words in the heading to the First Schedule, "Fees to be taken," indicate that a duty is cast upon the inspector to take them. His duties are statutory, and do not depend upon any direction or resolution of the county council. As to the third objection, the auditor's power to surcharge is given by

s. 247 of the Public Health Act, 1875 (1), which is applied to county councils by s. 71 of the Local Government Act, 1888 (51 & 52 Vict. c. 41). The amount of the fees which the inspector did not take is a sum which ought to have been but was not brought into account by him, and he was therefore rightly surcharged by the auditor with that amount.

Macmorran, K.C. (*A. G. M. McIntyre* with him), supported the rule. The county council has found it good policy not to exact a class of small fees in these cases, because they have found that the result has been that a greater number of weights and measures have been brought to the inspectors for verification and stamping. There is nothing in s. 13 of the Act of 1889 which prevents the county council from directing the inspector not to take those fees at all, nor is there anything to prevent him from acting on their direction. In taking the fees he only acts as their agent. Although the word "may," when used in an Act of Parliament, sometimes, no doubt, imports an obligation, it does not in s. 13 of this Act. The distinction between "may" and "shall" is carefully preserved throughout the Act: see ss. 2, 6, 7, 8, and 9. It was found that under s. 47 of the Act of 1878 county councils throughout the country appointed different maxima with respect to the fees which ought to be taken. The object of s. 13 of the Act of 1889 was only to provide one scale in respect of the fees which might be taken throughout the country; it was not intended to take away the power of remitting the fees altogether. The auditor had no power to surcharge the inspector in respect of sums which he had not received. The language of s. 247 of the Public Health Act, 1875, only applies to sums which have been received and have not been brought into account.

(1) 38 & 39 Vict. c. 55, s. 247, sub-s. 7: "Any auditor acting in pursuance of this section shall disallow every item of account contrary to law, and surcharge the same on the person making or authorizing the making of the illegal payment, and shall charge against any person accounting the amount of any deficiency or loss incurred by the negligence or misconduct of that person, or of any sum which ought to have been but is not brought into account by that person, and shall in every case certify the amount due from such person . . . ."

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LORD ALVERSTONE C.J. In this case we have nothing to do with any question of policy. It may be quite true that there have been differences of opinion between the county councils as to what fees should, or should not, be taken, and there may be much to be said for the view that the question of taking them or not taking them should be left to the discretion of the county council. We, however, are not concerned with that question: we have only to construe the Act of Parliament. In this case it appears that the inspector, acting in pursuance of a resolution of the county council, took no fees. The auditor, having the accounts of the county council before him, and his duty being to audit those accounts, and no others, finds the inspector's account rendered to the county council. It cannot be disputed that, if the inspector had collected these fees and not accounted for them, the auditor would have been right in surcharging him with the amount so collected; but it appeared that the inspector had charged no fees at all, and the auditor has surcharged him with the amount of the fees which he might have, but had not, collected. Thereupon this rule to quash the surcharge was obtained.

An important point is thus raised under the Weights and Measures Act, 1889. By the Weights and Measures Act, 1878, the Legislature gave local authorities power to fix from time to time the fees which their inspector might take. In support of the rule it was contended that the only effect of s. 13 of the Act of 1889 was to fix the standard of the fees which could be taken if any fees were taken at all, and that it was within the power of the county council to direct that no fees should be taken at all. I have been anxious to see whether any other independent authority is given to the county council to alter the fees, but it was admitted by counsel who appeared in support of the rule that their power rested only on s. 47 of the Act of 1878, which section has been repealed. Sect. 13 of the Act of 1889 omits to give the county council any power to vary or alter the fees. The words are: "An inspector of weights and measures *may* take . . . . the fees specified in the First Schedule to this Act, and no others," and the First Schedule is headed, "Fees to be taken," &c. In my opinion those words

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are not enough to justify us in holding that there is a discretion given to the county council to say whether the fees should or should not be taken, the express power to vary fees given in the earlier Act having been repealed. It was contended that the whole of s. 13 was conditional upon the exercise of the council's discretion as to whether any fees at all should be taken. I think we should be going too far if we said that. I think that the word "may" is only used to indicate that the inspector may take the fees specified in the schedule, and pay them over, and may not take any others. It would be difficult, in my view, to frame a section with that object in other language. I come to the conclusion, on the course which the legislation has taken and on the words of s. 13, that the inspector had an obligation imposed upon him by the statute to take these fees. It was said that there could be no surcharge of money upon him in respect of fees which he had not received, and that the language of s. 247, sub-s. 7, of the Public Health Act, 1875, did not cover sums which the inspector, as the agent of the local authority, did not include in his account because the local authority told him not to collect them. But those sums come within the later words of the section, "or of any sum which ought to have been but is not brought into account." The accounts audited are the accounts of the county council furnished by their various officers, and the sums in question ought to have, but have not, been included.

I am, therefore, of opinion that the auditor was right in making this surcharge, and that the rule ought to be discharged.

LAWRANCE J. I am of the same opinion.

Rule discharged.

Solicitors for applicant: *Pyke & Parrott.*
Solicitors for auditor: *Sharpe, Parker & Co.*

W. A.

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April 24, 25.

DICKSEE *v.* HOSKINS.

London County—Buildings—Part of Building used for Trade, Part for Dwelling-house—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 74, *sub-s.* 2.

A building is not "used in part for purposes of trade . . . . and in part as a dwelling-house" within the meaning of s. 74, sub-s. 2, of the London Building Act, 1894, unless the part used as a dwelling-house is so structurally severed from the part used for purposes of trade as to constitute a separate tenement.

CASE stated by a metropolitan police magistrate.

On October 17, 1900, an appeal under s. 150 of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), wherein F. C. Hoskins, the present respondent, was appellant, and B. Dicksee, the present appellant, was respondent, was heard at the Southwark Police Court, and the facts hereinafter set out were proved or admitted.

On July 11, 1900, the respondent Hoskins, who is a builder, served notice on the appellant Dicksee, who is a district surveyor, under s. 145 of the said Act, of the proposed erection of a building at 87, Old Kent Road, together with plans shewing that the proposed building was the re-erection of a licensed beerhouse on the site of an old beerhouse called The Horseshoe.

On August 15, 1900, the appellant, as district surveyor, served upon the respondent a notice of objection to the proposed erection of the said building under s. 150 of the said Act on the ground that it would be in contravention of s. 74, sub-s. 2, of the said Act. (1) The grounds of the objection were that the building would exceed ten squares in area and

(1) By s. 74, sub-s. 2, of the London Building Act, 1894, "In every building exceeding ten squares in area used in part for purposes of trade or manufacture and in part as a dwelling-house, the part used for the purposes of trade or manufacture shall be separated from the part used as a dwelling-house by walls and floors constructed of fire-resisting materials, and all passages, staircases, and other means of approach to the part used as a dwelling-house shall be constructed throughout of fire-resisting materials."

By s. 5, sub-s. 23, "The expression 'square' applied to the measurement of the area of a building means the space of 100 superficial feet."

would be used in part for purposes of trade and in part as a dwelling-house, but the part to be used for the purposes of trade would not be separated from the part to be used as a dwelling-house by walls and floors constructed of fire-resisting materials.

The building when erected will exceed ten squares in area, and will contain—(1.) in the basement, beer and wine cellars; (2.) on the ground-floor, a bar, public lobby, saloon bar, private bar, bar parlour, and a public room; (3.) on the first-floor, a sitting-room, three bedrooms, and a kitchen; and (4.) on the top floor, attics.

The old house called The Horseshoe and the site of the new building was licensed and used, and the new building when completed will be licensed and used, for the sale of wine and beer to be consumed on and off the premises under the Beerhouse Act, 1830 (11 Geo. 4 and 1 Will. 4, c. 64), and the Refreshment House Act, 1860 (23 & 24 Vict. c. 27), and the Acts amending the same respectively. The trade of the said beerhouse will be carried on on the basement and ground-floor, and the licensee and his family will reside in the upper floors of the building. The whole of the building will be covered by the justices' certificate and excise licence. The plans of the new building have been submitted to and approved by the licensing justices for the Newington division of the county of London.

The floors separating the ground-floor from the first-floor, and the staircase leading to the first-floor, will not be constructed of fire-resisting materials, and if s. 74, sub-s. 2, of the London Building Act, 1894, applies to this building, the provisions of that section will be contravened.

It was contended for the appellant that s. 74, sub-s. 2, applied to the building as it was to be used in part for the purposes of the trade of a beerhouse and in part as a dwelling-house.

It was contended for the respondent that s. 74, sub-s. 2, did not apply to a beerhouse, and the decision in *Carritt* v. *Godson* (1) was relied on.

The magistrate found as a fact that the basement and ground-floor of the building were intended to be used for the

(1) [1899] 2 Q. B. 193.

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purposes of the trade of a beerhouse, and that the part above the ground-floor was intended to be used as a dwelling-house for the licensed occupier; but he held that the case was governed by the decision in *Carritt* v. *Godson* (1) and overruled the objection of the district surveyor.

Avory, *K.C.*, for the appellant. When considering the question whether a particular building which is in process of erection is partly used for the purposes of trade and partly as a dwelling-house within the meaning of the section, the Court must look at the intention of the builder. The mere fact that the trade may be carried on in all parts of the building, in the sense that it would not be a breach of the law to do so, is immaterial. The question is, Will it in fact be carried on in one part only? The decision in *Carritt* v. *Godson* (1) did not proceed on the ground that the licence covered the whole premises, but on the ground that there was in the case as stated nothing to shew which part of the house was to be used for the purpose of the trade and which for a dwelling-house. The Court in that case seem to have drawn the inference of fact that the whole house was intended to be used for the purposes of trade.

[LORD ALVERSTONE C.J. Was not s. 74 intended to be confined to the case of a building in which the part used as a dwelling-house has a separate entrance?]

No; for the section is designed to provide against risk from fire. And if it is to apply to a case where the dwelling portion has a separate entrance, a fortiori must it apply to a case where it has no separate entrance, because of the greater difficulty of escape.

Danckwerts, *K.C.*, and *Craies*, for the respondent, were not called on.

LORD ALVERSTONE C.J. In deciding this case I do not wish to rest my judgment upon the decision in *Carritt* v. *Godson* (1) alone, although in my opinion that decision was perfectly right. I prefer to base my judgment upon a broader ground. The question which we are called upon to decide is whether the facts bring the case within s. 74, sub-s. 2, of the London Building Act, 1894, which provides that "In every

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building exceeding ten squares in area used in part for purposes of trade or manufacture and in part as a dwelling-house, the part used for the purposes of trade or manufacture shall be separated from the part used as a dwelling-house by walls and floors constructed of fire-resisting materials." The magistrate has indeed found as a fact that the basement and ground-floor were intended to be used for the purposes of the trade of a beerhouse and the upper floors for the residence of the licensed person; still the case is that of an ordinary beerhouse, in which the portions used for residence and trade respectively form part and parcel of the same tenement. It was contended by Mr. Avory that the section applies to such a case, and indeed to every case of a shop which has a bedroom over it, the only suggested limitation being that the house must exceed ten squares in area. With that contention I cannot agree. In my opinion, the section was intended to apply to a case in which the part of the building used for purposes of residence is structurally severed from the part used for the purposes of trade and approached by a separate entrance, so that the two parts, although under the same roof, constitute in fact two separate tenements. The case of *Carritt* v. *Godson* (1) supports this view; but I wish it to be understood that I have arrived at this conclusion upon consideration of the language and object of the section quite apart from that decision, although I entirely concur in it.

The appeal must be dismissed.

LAWRANCE J. I agree. I only desire to add that the judgments of Day J. and myself in *Carritt* v. *Godson* (1) were directed to agreement with the argument which was there addressed to us by the counsel for the respondents. But I entirely concur in resting the present case upon the wider ground taken by my Lord in his judgment.

Appeal dismissed.

Solicitor for appellant: *Blaxland.*

Solicitor for respondent: *P. Gates.*

(1) [1899] 2 Q. B. 193.

C. A. 1901 *April* 17; *May* 3.

[IN THE COURT OF APPEAL.]

NICKOLL & KNIGHT *v.* ASHTON, EDRIDGE & CO.

Contract — Impossibility of Performance — Implied Condition — Cargo to be Shipped by specified Ship—Ship damaged so as to be unable to receive Cargo.

By a contract made in October, 1899, the defendants sold to the plaintiffs a cargo of cotton-seed, to be shipped per steamship *Orlando* at an Egyptian port during the month of January, 1900, and to be delivered to the plaintiffs in the United Kingdom. The contract provided that, in case of prohibition of export, blockade, or hostilities preventing shipment, the contract or any unfulfilled part thereof should be cancelled. In December, 1899, the *Orlando* was stranded through perils of the sea without default on the defendants' part, and was so much damaged as to render it impossible for her to arrive at the port of loading in time to load during January. In an action by the plaintiffs against the defendants for failure to ship a cargo under the contract:—

Held, by A. L. Smith M.R. and Romer L.J. (Vaughan Williams L.J. dissenting), that the contract must be construed as subject to an implied condition that, if at the time for its performance the *Orlando* should, without default on the defendants' part, have ceased to exist as a ship fit for the purpose of shipping the cargo, then the contract should be treated as at an end; and that the action was therefore not maintainable.

Taylor v. *Caldwell*, (1863) 3 B. & S. 826, and *Howell* v. *Coupland*, (1876) 1 Q. B. D. 258, followed.

APPEAL from the judgment of Mathew J. at the trial before him without a jury. (1)

By a contract dated October 24, 1899, the defendants sold to the plaintiffs a cargo of Egyptian cotton-seed, to consist of from 1600 to 1900 tons, to be shipped per steamship *Orlando*, at Alexandria $\frac{\text{and}}{\text{or}}$ Port Said $\frac{\text{and}}{\text{or}}$ Ismailia, during the month of January, 1900, at 6*l.* 3*s.* 9*d.* per ton, and to be delivered in the United Kingdom. In drawing up the contract the words "ship or ships" in print had been obliterated, and the words "per steamship *Orlando*" substituted for them in writing. Clause 5 of the contract provided that, "In case of prohibition of export, blockade, or hostilities preventing shipment, this contract or any unfulfilled part thereof is to be cancelled."

(1) [1900] 2 Q. B. 298.

The *Orlando* had been chartered for the carriage of the cargo in question, not by the defendants, but by persons from whom they had bought the cargo. In December, 1899, the *Orlando* stranded in the Sound through perils of the sea, and was so badly damaged as to make it impossible for her to arrive at the ports of loading under the contract in time to load during the month of January; and of that fact notice was given by the charterers to the plaintiffs on December 20. At that date the price of cotton-seed had risen slightly above the contract price, and it continued to rise until the end of January, at which latter date the market price was 7*l.* 13*s.* 9*d.* per ton. The plaintiffs might at the end of December, when they had notice of the *Orlando's* stranding, have bought in the market another cargo of cotton-seed in substitution for that which had been sold to them by the defendants, but did not do so. On December 28 the defendants wrote to the plaintiffs to the effect that, as performance of the contract was rendered impossible, they considered the transaction as cancelled. The plaintiffs subsequently brought the action against the defendants for failure to ship a cargo of cotton-seed under the contract, claiming as damages the difference between the contract price of 6*l.* 3*s.* 9*d.* per ton and 7*l.* 13*s.* 9*d.* per ton, the market price on January 31. The defendants paid money into court in the alternative, together with a denial of liability.

The learned judge held that the contract must be read as subject to an implied condition that, in the event of the *Orlando's* being through perils of the sea rendered unfit to ship the cargo in January at the port of loading, the contract should be treated as at an end, and therefore gave judgment for the defendants. He further expressed an opinion that, if the defendants had been liable, the measure of damages would only have been the difference between the contract price and the market price at the date when the plaintiffs had notice that the *Orlando* would not be able to ship the cargo.

April 17. *Joseph Walton*, *K.C.*, and *Hollams*, for the plaintiffs. The first question is whether it is, as the learned judge has held, an implied condition of the contract that, in

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the event of the *Orlando* being unable, from causes beyond the defendants' control, to arrive at the port of loading within the stipulated time, the contract shall be at an end. It is submitted that no such condition can be implied. The terms of the contract import an absolute contract by the defendants to ship the cargo upon the ship named in January, subject only to the exceptions specified in clause 5. There is no principle upon which such a contract can be further qualified by an implied exception as suggested. The case is not really analogous to that of *Taylor* v. *Caldwell* (1), in which it was laid down that, where, from the nature of a contract, the parties to it must have known that it could not be performed unless some specified thing continued to exist, in the absence of any express or implied warranty that the thing should continue to exist, the contract is to be construed, not as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor. Here there is no question of the *Orlando* having perished. It is merely a question of her being delayed by stranding. Suppose she had been delayed by adverse winds. It could not be said in that case that the doctrine of *Taylor* v. *Caldwell* (1) would apply; but there is no real difference in principle between that case and the present. By the terms of the contract it was clearly for the defendants to procure the arrival of the *Orlando* at Alexandria. It is similar to the case of a shipowner who has contracted to send his ship to a port to load by a certain time. In the absence of any exception of sea perils, it has been held that such a contract will be construed as absolute, and not as conditional on the weather permitting the ship's arrival at the port by the specified time: *Shubrick* v. *Salmond*. (2) The terms of the contract as much import an absolute obligation to procure the arrival of the ship as to procure the cotton-seed. It would be impossible to suggest that the contract was subject to an implied condition that the vendors could procure the cotton-seed.

(1) 3 B. & S. 826.

(2) (1765) 3 Burr. 1637.

[They also cited on this point *Ashmore & Son* v. *Cox & Co.* (1); *Hills* v. *Sughrue* (2); *Howell* v. *Coupland.* (3)]

Assuming the defendants to be liable, a question arises as to the measure of damages. It is contended by the plaintiffs that they are entitled to the difference between the contract price and the price at the end of January. It is contended for the defendants that the plaintiffs are only entitled to the difference between the contract price and the price in December, when they had notice that the *Orlando* could not possibly arrive in time to load in January. There is no doubt on the authorities such as *Hochster* v. *De la Tour* (4), and *Frost* v. *Knight* (5) that, where one party to a contract of sale prospectively announces his intention to break it, the other may elect to treat that as a definitive breach, and, if he does, then he is bound to mitigate the damages by buying or selling, as the case may be, against the other. But it is contended that he is not bound to treat the prospective notice of intention as a breach, but may wait until the time for completion arrives. Announcement of the future impossibility of performance stands on the same footing for this purpose as notice of intention to break the contract in futuro.

Bray, K.C., and *E. Bray*, for the defendants. The principle laid down by Blackburn J. in delivering the judgment in *Taylor* v. *Caldwell* (6) really covers this case. That principle is that a contract, the performance of which by its very nature necessarily relates to, or depends upon, the existence of a specific thing, is primâ facie conditional on the existence of that thing, and not absolute, though, of course, there may be a contract which warrants the continued existence of the thing in question. Having regard to that principle, it is submitted that the contract in this case was clearly conditional on the continued existence of the *Orlando*. In *Ashmore & Son* v. *Cox & Co.* (1), the contract was not, as in this case, for shipment by a specific ship, but merely "by sailer or sailers." It is submitted that

(1) [1899] 1 Q. B. 436.
(2) (1846) 15 M. & W. 253.
(3) (1874) L. R. 9 Q. B. 462; (1876) 1 Q. B. D. 258.
(4) (1853) 2 E. & B. 678.
(5) (1872) L. R. 7 Ex. 111.
(6) 3 B. & S. 826.

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the principle of *Taylor* v. *Caldwell* (1) applies to a case where the specified ship is, without default of the defendant, unavoidably prevented by the perils of the sea from arriving at the port of loading by the time appointed as much as to a case where it has ceased to exist. In substance for the purposes of this contract the *Orlando* was as much non-existent as if in January she had been at the bottom of the sea. She was not in existence then at Alexandria. The express mention of certain exceptions in clause 5 does not in any way prevent the implication of the condition for which the defendants contend; for those exceptions all have relation to an altogether different state of things. They contemplate the arrival of the *Orlando* in time, and her being prevented from loading on arrival. The doctrine "expressum facit cessare tacitum" only applies to cases where the matter expressed is such as to render it inconsistent or unlikely that the implied condition should be intended to coexist. This is not such a case. For example, why should the insertion of an express provision as to a blockade render the doctrine of *Taylor* v. *Caldwell* (1) less applicable to this case? *Howell* v. *Coupland* (2) is strongly in the defendants' favour.

[They also cited on this point *Robinson* v. *Davison* (3); *Johnson* v. *Macdonald*. (4)]

With regard to the question of damages, it is contended that the opinion expressed by the learned judge was right; but the defendants have paid a sufficient amount into court to cover the damages on whatever principle they may be calculated.

Joseph Walton, K.C., in reply. The only implied condition mentioned in *Taylor* v. *Caldwell* (1) is that the specified thing in question shall continue to exist. In this case the *Orlando* did continue to exist; so there can be no question of implying that condition. It is sought now to extend the principle of that case to a case where the specified thing continues to exist, but is prevented from arriving, or delayed in arriving, at the place where the contract is to be performed by unavoidable circumstances. There is no authority for such an extension of

(1) 3 B. & S. 826.
(2) L. R. 9 Q. B. 462; 1 Q. B. D. 258.
(3) (1871) L. R. 6 Ex. 269.
(4) (1842) 9 M. & W. 600.

the doctrine, and it is difficult to see to what length it might be carried. There is no case which says that a contract to use a specified thing in a particular manner involves an implied condition that it shall be possible under the circumstances so to use it. There is no decision that, where a person has contracted to ship by a particular ship by a certain time, his obligation is cancelled, if, from causes beyond his control, the ship cannot be there in time. In *Robinson* v. *Davison* (1) the contract was for personal services, a case which stands upon a different footing.

Cur. adv. vult.

May 3. A. L. SMITH M.R. read the following judgment:— This is an action for damages by the buyers of a cargo of Egyptian cotton-seed against the sellers for not shipping the same pursuant to a contract dated October 24, 1899, and the question is whether upon its true construction the contract is a positive and absolute contract to ship the seed, or a contract subject to any, and what, implied condition.

The contract upon which the question arises, so far as material, is as follows: "Sold this day to Messrs. Nickoll & Knight the following Egyptian cotton-seed—namely, a cargo to consist of from 1600 tons to 1900 tons to be shipped by the steamship *Orlando* at Alexandria . . . . during the month of January, 1900. (Signed) Ashton & Co." Clause 5 is as follows: "In case of prohibition of export, blockade, or hostilities preventing the shipment the contract or any unfulfilled part thereof is to be cancelled." It is perfectly plain upon the face of the signed contract that the parties deliberately agreed that the shipment of the seed should not be in any ship or ships, but in one particular named ship, for the words in print "ship or ships" are obliterated, and the words "per steamship *Orlando*" are inserted in writing in their place, and it is equally plain that the contract could only be performed by the defendants shipping the seed contracted for in the steamship *Orlando* during the month of January, 1900, and in no other ship.

(1) L. R. 6 Ex. 269.

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Now, is a contract such as this a positive and absolute contract by the shipper to ship on board the named ship the contracted cargo, or is it a contract subject to any, and what, implied condition? I find in the judgment of Blackburn J., delivering the unanimous judgment of the Court of Queen's Bench in the year 1863 in *Taylor* v. *Caldwell* (1), which case has been followed and applied in the Exchequer Chamber in *Appleby* v. *Myers* (2), and in the Court of Exchequer in *Robinson* v. *Davison* (3), and in the Queen's Bench and Court of Appeal in *Howell* v. *Coupland* (4), that a rule as to the construction of certain contracts has been laid down, which rule is as follows: "Where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case before breach performance becomes impossible from the perishing of the thing without default of the contractor."

In my judgment the contract in the present case falls directly within this rule, for, from the beginning, the parties must have known that the performance of the contract would become impossible unless the particular thing specified, that is, the steamship *Orlando*, continued to exist as a cargo-carrying ship down to and during the month of January, 1900; and I have no doubt that the true construction of the contract is that it is not a positive and absolute contract as contended for by the plaintiffs, but is a contract subject to the condition that the parties shall be excused if, before breach, performance becomes impossible by reason of the particular specified thing, that is,

(1) 3 B. & S. 826.
(2) (1867) L. R. 2 C. P. 651.
(3) L. R. 6 Ex. 269.
(4) L. R. 9 Q. B. 462; 1 Q. B. D. 258.

the steamship *Orlando* ceasing to exist as a cargo-carrying ship without the defendants' default.

But it is argued that, although there may be this implied condition, it only applies if the particular thing actually perishes; for instance, it is suggested that, if the roof of the music-hall in *Taylor* v. *Caldwell* (1) had alone been destroyed and the hall itself not burnt to the ground, the judgment in that case would not have been given, even although with the roof off the hall could not have been used for the purpose for which it was let, and it is said that, as the steamship *Orlando* did not actually perish, this case is not within the implied condition. I do not agree. In my judgment, if the ship ceased to exist as a cargo-carrying ship when the time for the performance of the contract arrived, so that it could not be used to ship the cargo in, the implied condition would attach. If the steamship had gone to the bottom before the month of January, 1900, and remained there during that month, so as to be wholly unable to take in a cargo, would not the ship have ceased to exist, whereby the performance of the contract became impossible, the ship being then at the bottom of the sea? Quoad the performance of the contract, it would have perished; and what is the difference in principle between the ship being at the bottom of the sea and being stranded upon a rock in the Baltic, as the *Orlando* was, and thereby wholly unable to take in a cargo pursuant to the contract? In either case, in my opinion, the performance of the contract became impossible by reason of the particular specified thing, i.e., the ship, ceasing to exist as a cargo-carrying ship, or, in other words, as regards that purpose having perished. This is not a case in which the thing contracted for is possible in itself, and the contracting party is unable to perform it only through causes beyond his own control, such as an unexpected sudden frost: *Kearon* v. *Pearson*. (2) In such a case it is the party's own fault for undertaking unconditionally to fulfil a promise. In the present case, as before pointed out, he has not done so, for the promise he has made is conditional. It also seems to me that the suggested point of the detention of a ship by adverse winds clearly

(1) 3 B. & S. 826. (2) (1861) 7 H. & N. 386.

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would not fall within the above rule, for in such a case the ship has not ceased to exist at all. It exists as a cargo-carrying ship, but is merely behind time on its voyage.

The next point taken by the plaintiffs was that by reason of clause 5 of the contract the implied condition of the continued existence of the ship was negatived, and that it was only the matters mentioned in that clause which excused the performance of the contract. In my opinion the matters mentioned in clause 5 in no way negative the true construction of the contract, which is that the contract is not positive and absolute, and that clause 5 affords an excuse for the not shipping of the cargo, over and above the perishing of the ship, which is the implied condition. In my judgment it is not true to say that there is a warranty in this contract that the ship shall be in existence in January, 1900. I think that the judgment of Mathew J. is correct, and that this appeal must be dismissed.

VAUGHAN WILLIAMS L.J. read the following judgment:—I regret to say that I have come to a different conclusion from that arrived at by the Master of the Rolls, with which I understand Romer L.J. agrees.

The question in this case is whether, according to the true construction of the cotton-seed cargo contract, there was an absolute contract by the sellers, the now defendants, to load a cargo in January. In other words, did the sellers take upon themselves the risk of the ship declared by them under this contract being prevented by unforeseen circumstances beyond their control from loading a cargo at one of the ports of loading named in the contract during the month of January, 1900? It was argued by the plaintiffs that there was an absolute contract, and that the defendants did take the risk from which they had not in terms protected themselves. On the other hand, it was argued by the defendants that this was a case of a cargo to be shipped by a particular vessel at a named port at a particular time, and that the obligation to load was made to depend on the arrival of that vessel at that port at the proper time; and that the defendants had not warranted that the

vessel should be able and ready to take the cargo on board at the stipulated time, and therefore that the defendants were, in the event which had happened, of the disability of the ship through perils of the sea, without default of the defendants, to take the cargo at Alexandria at the proper time, relieved from further performance of a contract which assumed the continued existence and safe arrival of the vessel in a condition fit to take the cargo. The obligation to ship the cargo, the defendants argued, was not absolute, but, in common with every other obligation in the contract, was conditional on the arrival in proper time of the declared vessel at Alexandria.

Now it was settled by the judgment of Blackburn J. in *Taylor* v. *Caldwell* (1) that "where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

Prior to the decision in *Howell* v. *Coupland* (2), it used to be supposed that the doctrine as expressed by Blackburn J., like the cases "de certo corpore" cited by him from the civil law, was based upon the assumption of the continued existence, at the date for the fulfilment of the contract, of something existing at the date of the making of the contract: which is obviously quite different from the present existence, at the date for fulfilment of the contract, of something to come into existence after the contract by the action of a party to it done in pursuance of the contract. The principle laid down in *Taylor* v. *Caldwell* (1) was, however, somewhat widened in the case of *Howell* v. *Coupland* (2); for in that case it was decided that on a contract

(1) 3 B. & S. 826. (2) L. R. 9 Q. B. 462; 1 Q. B. D. 258.

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for the sale of a specific crop on particular land the seller is to be excused, if the performance is prevented by the subject-matter of sale ceasing to exist, without default of the promisor, before the time of performance, even though the subject-matter of the contract was not in existence at the time of the contract as is assumed, as it seems to me, in the principle as stated by Blackburn J. The fact is that the answer to the question whether the obligation of the contract is dependent on the existence of some thing, or combination of things, at the time for fulfilment, or whether one party to the contract warrants the existence at that time of that thing, or combination of things, is always a question of intention of the parties to be gathered from the contract as expressed and the subject of it. Hannen J. in *Baily* v. *De Crespigny* (1) thus expresses himself: "There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was, or might have been, anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But, where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens." Can it be said that the non-arrival of the *Orlando* at Alexandria in January (the event which caused the impossibility) was not, or might not have been, anticipated and guarded against in the contract? Or can it be said that that event cannot be reasonably supposed to have been in the contemplation of the contracting parties, or that the general words were not used with reference to the possibility of the contingency which afterwards happened, namely, the non-arrival in time at Alexandria of the *Orlando* by reason of the perils of the sea? I do not think so, nor do I think business

(1) (1869) L. R. 4 Q. B. 180.

people would think so. The time of loading is a condition introduced into the contract for the benefit of the buyers. It is a condition which the buyers could waive. The event which caused the impossibility of loading in January is an event against which the sellers could have insured. The selection of the vessel, the terms of the charter of that vessel, the risk the vessel selected would have to run by reason of the length of the preliminary voyage, are all matters within the control of the sellers. The buyers have no voice in the matter. Is it unreasonable to read the general words as throwing on the sellers the risk of the non-arrival of the selected ship within the contract time? The sellers might have excepted this risk, or insured against it. It seems to me that, in order to prevent general words covering a particular obligation, which in terms the general words are wide enough to include, the particular obligation must be of the essence of the contract, and, further, must be of the essence of the contract in such sense that neither party can waive the obligation, or, to express it in other words, the condition must be such that to waive it would be to make a new and a different contract. No doubt, where a contract is made with reference to certain anticipated circumstances, and where, without default of either party, it becomes wholly inapplicable to any such circumstances, it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made; but, where a party to a contract promises the other party to do a certain thing, or to have a certain thing done, at or before a specified time, and fails to perform his promise, in such case, even though the thing promised to be done is of the essence of the contract, and a condition precedent, so that the promisor cannot claim to have the promisee carry out his side of the contract, this does not put an end to the contract in such sense that neither party can enforce any obligation under it against the other, but only gives the promisee the option to rescind the contract, unless indeed the anticipated circumstance which has failed to occur or continue is of such a character as to put an end in a commercial sense to the commercial speculation entered upon by the parties to the contract; but a circumstance

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which one of the parties to the contract can waive without putting an end to the commercial speculation cannot be such a circumstance.

In the present case nothing has caused it to be impossible for the sellers to supply cotton-seed of the contract quality, or to prevent them shipping it on board the *Orlando* at Alexandria. The sellers, according to my view, took upon themselves to promise that the owners of the *Orlando* should have her at Alexandria ready to take the cargo at a specified time. The peril of the sea has made it impossible for the owners of the *Orlando* to have her there at that time, and made it impossible therefore for the sellers to load the *Orlando* at Alexandria in January, but this event has not made it impossible that the contract should be carried out. On the contrary, if the buyers choose to waive the time condition, the contract can be performed by loading the *Orlando* at Alexandria. Nothing in the facts of this case suggests that the delay for repairs was so long as to put an end to the commercial speculation intended by the parties to the contract. By reason of the perils of the sea the *Orlando* did not arrive at the time the shipowner contracted it should arrive, but the delay was not such that the voyage was frustrated, neither was the contract of sale. It follows that the plaintiffs had a good cause of action on the failure of the sellers to load the cotton-seed, even though the perils of the sea made it impossible for the *Orlando* to arrive at Alexandria at the specified time.

I have thought it right to express my opinion on this matter (which unfortunately is contrary to that of my brothers), although it is not, for a reason which I will give, of very great practical importance with regard to the result of the action; for I entirely agree with the opinion of Mathew J. as to the measure of damages in case the plaintiffs have a right of action; and according to this measure the sum paid into court, together with a denial of liability, is more than sufficient to satisfy the plaintiffs' cause of action.

ROMER L.J. A clear principle applicable to the kind of case we are now considering was laid down by Blackburn J. in

delivering the judgment of the Court in *Taylor* v. *Caldwell*. (1) The passage of the judgment in which that principle is stated has already been read. It was laid down after a review of all the existing authorities, and evidently after careful consideration. That case has often been followed, and has never, so far as I am aware, been dissented from. The principle there laid down appears to me to be one which works justice between the parties to contracts of this kind. It is a principle easy to follow, and one which affords a certain guide in a doubtful and difficult class of legal questions. It is useful to business people to know the law on such a subject. I think it would be most unfortunate that the principle applicable in such cases should be rendered uncertain, and, therefore, I think that it is important that the principle, exactly as laid down in the case to which I have referred, should be adhered to, and not rendered doubtful or weakened by making exceptions to its application. The question is whether that principle applies to the case before us. In my opinion it does. Following the words in which it was laid down in relation to the facts of the present case, I think that the parties to this contract must from the beginning have known that it could not be fulfilled unless in January, 1900, a particular specified thing necessary for carrying it out, namely, the steamship *Orlando*, continued to exist, and therefore they must at the date of the contract have contemplated such continuing existence as the foundation of what was to be done under the contract. Then is there here any implied warranty by the defendants that the ship shall so continue to exist? Express warranty to that effect clearly there is none; and, in my opinion, no such warranty can be implied. Some liability on the part of the vendors in respect of the ship must I think be implied, and many difficult cases with regard to the extent of that liability might conceivably arise. But I do not think that it is necessary in this case to consider what exactly the extent of the liability to be implied may be; for I think that it cannot be implied that the vendors warranted that the ship in question should continue to exist in January.

(1) 3 B. & S. 826.

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That being so, in my opinion the principle laid down in *Taylor* v. *Caldwell* (1) applies. The only question that remains is whether the ship continued to exist in January, 1900, within the meaning of that principle. I think that she did not then continue to exist within the meaning of that expression as used by Blackburn J. She was not then in existence as a cargo-bearing ship or for the purposes of the contract. This point has been fully dealt with by the Master of the Rolls, and I need not add anything to what he has said in reference to it. With regard to the argument founded on clause 5 of the contract, that clause does not in my opinion affect the view which I have expressed, for the different special circumstances dealt with in that clause all contemplate the continuing existence of the ship. For these reasons I agree with the Master of the Rolls that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Hollams & Co.*
Solicitors for defendants: *Tilleards & Co.*

(1) 3 B. & S. 826.

E. L.

THE KING *v.* DR. TRISTRAM AND DAVEY.

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March 21.

Prohibition—Consistory Court—Patent of Commissary and Vicar General—Reservation to Bishop of certain Causes—Questions of Procedure not affecting Jurisdiction.

By letters patent appointing a Chancellor for a diocese, the bishop gave him power to determine certain causes, "Nevertheless first consulting us and our successors, and having our consent in case either party earnestly crave our judgment." A suit was promoted for the removal of certain ornaments from a church in the diocese, and the respondents in their reply asked that the bishop should be first consulted and his consent had, and earnestly craved his judgment. The Chancellor heard the suit and pronounced an order, in which it did not appear that he had first consulted the bishop or had his consent. On an application for a writ of prohibition:—

Held, that there was not such a defect of jurisdiction apparent on the record as would justify the issue of the writ, but that if there was any defect it was in the procedure of the Court, and was the proper subject of appeal.

RULE NISI for a prohibition.

On August 30, 1892, the Bishop of Chichester by letters patent appointed Thomas Hutchinson Tristram, Esq., Q.C., D.C.L., to be commissary, official principal, and vicar general in spirituals of the bishop and his successors in and throughout the whole archdeaconry of Lewes. The patent continued as follows: "Moreover, we do for us and our successors give, grant, and confirm unto the said Thomas Hutchinson Tristram during his natural life, that in our absence from our Consistory Court of Lewes he shall and may proceed by himself, his assignee or substitute, assignees or substitutes, as well in all and singular causes, businesses, suits, and complaints spiritual and ecclesiastical, at the instance or promotion of whatsoever parties as by our mere and mixed office, also in all causes of dilapidation of the goods of the church and robbing of churches, and in all other businesses and causes whatsoever (except hereafter excepted) in our episcopal Consistory Court of Lewes moved or to be moved, the cognizance and decision whereof is known by law or custom of the realm to belong to our Ecclesiastical Court, and to decide and finally determine

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all and singular those the causes aforesaid (except hereafter excepted), with all the rights thereto incident, issuing, depending, annexed, and connexed, without breach of the laws and statutes of this excellent kingdom. Nevertheless first consulting us and our successors, and having our consent in case either party earnestly crave our judgment. . . .

"Except, notwithstanding, and always reserved to us and our successors the complaints and supplications hereafter to be made by whatsoever clergy in all and singular causes, and reserved also to us and our successors equally to examine and determine every cause in our proper person in our Court of Consistory."

On January 18, 1899, a cause of faculty was instituted by petition on behalf of one George Davey, therein alleged to be a parishioner of the parish of the Church of the Annunciation in the town of Brighton, in the diocese of Chichester, the suit being promoted for the purpose of obtaining a faculty authorizing the removal out of the church of certain ornaments alleged to be illegal.

Appearances to the citation in the suit were entered on behalf of the vicar and churchwardens, and they filed an answer which, in the 1st paragraph, denied that the petitioner was a parishioner of the parish, and of which the 5th paragraph was as follows: "The respondents allege and propound that before any decision or final determination of the cause aforesaid the Right Reverend Father in God, Ernest Roland, Lord Bishop of Chichester, should be first consulted and his consent had, and they earnestly crave his judgment in the premises, and humbly complain and supplicate that the said Lord Bishop should examine and determine the said cause in his own proper person in this Court."

The cause came on to be heard at Lewes before Dr. Tristram, as Chancellor of the diocese, and on February 1, 1900, he gave judgment that Davey was qualified as a parishioner to present the petition. (1)

An appeal against this decision to the Court of Arches was abandoned, and on August 21, 1900, Dr. Tristram gave judg-

(1) See [1901] P. 95, at p. 106.

ment on the merits of the case, ordering the removal of certain ornaments from the church. (1) In the course of his judgment he dealt with the 5th paragraph of the answer of the respondents, and held that the reservation contained in the patent, "Nevertheless first consulting us and our successors, and having our consent in case either party earnestly crave our judgment," was invalid; but in the order which he made he did not state that he had not consulted the bishop, or had his consent.

The vicar and churchwardens then applied for and obtained this rule nisi calling on Dr. Tristram and George Davey to shew cause why a writ of prohibition should not issue to prohibit them from further proceeding in the suit.

Dibdin, K.C. (*Reginald Dodd* with him), shewed cause against the rule. Assuming that the reservations to the bishop contained in the patent are valid, nevertheless this is a matter of procedure, and prohibition will not lie. There is no question of jurisdiction, but purely one of practice and procedure. In *Martin* v. *Mackonochie* (2) Lush J. said: "the practice and procedure of every Court, when no Act of Parliament intervenes to regulate it, ... is within the exclusive cognizance of the Court itself." And in the Court of Appeal, where the judgment of Lush J. was upheld, Thesiger L.J. said that the mode in which a suit in an Ecclesiastical Court is to be conducted is (3), "in the absence of statutory provision relating to these matters, to be regulated by the practice of the Court itself, and . . . . if the judge errs, appeal and not prohibition would be the proper remedy." And in *Mackonochie* v. *Lord Penzance* (4) Lord Selborne L.C. said (5): "The question resolves itself simply and entirely into one of the proper course, practice, and procedure of an Ecclesiastical Court. . . . Such a question ought, in my opinion, to be determined in the ecclesiastical and not (by prohibition or otherwise) in any temporal forum"; and it was laid down by Lord Watson in the same case (6) that in questions of the procedure of the Ecclesiastical Courts the

(1) See [1901] P. 95, at p. 114.
(2) (1878) 3 Q. B. D. 730, at p. 739.
(3) (1879) 4 Q. B. D. 697, at p. 732.
(4) (1881) 6 App. Cas. 424.
(5) 6 App. Cas. at p. 431.
(6) 6 App. Cas. at p. 458.

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temporal Courts ought not to interfere with their determination "unless it can be shewn to be either repugnant to the principles of natural justice or contrary to statute." Similar doctrines were enunciated in *Ex parte Story* (1), and questions of error in procedure in Ecclesiastical Courts have never been held to be ground for prohibition, but can be set right by appeal.

Even assuming, however, that a neglect by Dr. Tristram to consult the bishop and get his consent were ground for a prohibition, that fault does not appear on the record. There can be no prohibition as of right where the defect in jurisdiction does not appear on the face of the proceedings: *Mayor, &c., of London* v. *Cox* (2), but the issue of the writ is then merely discretionary. No doubt by paragraph 5 of the answer of the vicar and churchwardens the point is taken, and they earnestly crave the judgment of the bishop, but it does not appear on the record that their request was not complied with.

Duke, K.C., and *E. W. Hansell*, in support of the rule. The point is not one of practice and procedure, but of jurisdiction. Dr. Tristram had no jurisdiction to hear this cause after the request of the parties for the bishop's judgment unless he was authorized ad hoc, since by the patent the bishop specially reserves to himself such cases, or, at any rate, the right to say whether he would hear them himself or not. Until Dr. Tristram had consulted the bishop and had got his leave to go on he was not the right judge to try the case, and therefore the question is clearly one of jurisdiction, and prohibition will lie. It is within the bishop's power to reserve in the patent any cases he thinks fit for his own hearing: *Boyd* v. *Phillpotts* (3), where a similar patent was examined by Sir R. Phillimore. In *Ex parte Medwin* (4) Lord Campbell, commenting on a similar patent, compares the bishop's Chancellor to the Queen's judges, and remarks that the analogy fails, since at the prayer of the party the bishop's own judgment may be invoked. Since it was invoked here and the Chancellor did not lay the matter before the bishop, he acted without jurisdiction, and the right remedy

(1) (1852) 22 L. J. (C.P.) 75.
(2) (1866) L. R. 2 H. L. 239.
(3) (1874) L. R. 4 A. & E. 297.
(4) (1853) 1 E. & B. 609.

is not appeal, but prohibition: *Serjeant* v. *Dale* (1); *White* v. *Steele*. (2) There was here a defect of jurisdiction over the whole matter and not over any particular issue, and prohibition will lie: *Mayor, &c., of London* v. *Cox*. (3)

The defect in jurisdiction appears from the pleadings, and it is clear from the judgment that the Chancellor did not consult the bishop. The want of jurisdiction, therefore, is apparent on the record.

DARLING J. In this case cause is shewn against a rule which has been obtained for a writ of prohibition directed to the Consistory Court of the Bishop of Chichester.

It appears that there was a suit instituted by a parishioner of a parish within the diocese of Chichester in the Consistory Court. The cause was heard before the Chancellor of the diocese, Dr. Tristram, who derived his powers as a judge by virtue of a patent granted to him by the predecessor of the present bishop.

The law appears to be clear that the bishop, who had originally the right to act as judge in that Court, is bound to appoint a Chancellor to perform the duties of a judge. It has been said by Lord Campbell in *Ex parte Medwin* (4) that the analogy up to a certain point is the analogy of the Sovereign, who originally had jurisdiction to hear and determine all causes in his courts, but who is now bound to appoint judges to hear and determine them. So is the bishop. The point where the analogy fails is this: that the Sovereign is bound by the constitution to appoint judges to hear and determine causes without reserving any power of interference to himself. By long custom it appears to be legal that the bishop should reserve certain powers of intervention to himself if it be asked for by the parties in the cause. In this particular patent the bishop who appointed Dr. Tristram to be Chancellor did reserve (I will point out how presently) something to himself and his successors, but he appointed him in these words: "Moreover we do for us and our successors give, grant, and confirm unto the said Thomas

(1) (1877) 2 Q. B. D. 558.
(2) (1862) 12 C. B. (N.S.) 383.
(3) L. R. 2 H. L. 239.
(4) 1 E. & B. 609.

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Hutchinson Tristram during his natural life that in our absence from our Consistory Court of Lewes he shall and may proceed by himself" (or by certain substitutes) "as well in all and singular causes, businesses, suits, and complaints, spiritual and ecclesiastical, at the instance or promotion of whatsoever parties as by our mere and mixed office"—and so on—"and to decide and finally determine all and singular those the causes aforesaid (except hereafter excepted)." I think that applies to certain causes which are afterwards excepted, and does not apply to the words upon which this case has been principally argued, which I do not look upon as an exception from this jurisdiction at all, but merely as a qualification or explanation of how in the causes which are confided to Dr. Tristram he is to deal with them, provided that the parties request that he shall deal with them, in a particular way, "with all the rights thereto incident, issuing, depending, annexed, and connexed, without breach of the laws and statutes of this excellent kingdom." Now comes what I call the qualification: "Nevertheless first consulting us and our successors, and having our consent in case either party earnestly crave our judgment."

Now, it appears to me that it is not that Dr. Tristram is to first consult the bishop in causes which he is not to hear and not to determine, but that he is first to consult the bishop in causes which he, Dr. Tristram, has the power and jurisdiction to hear and determine. He is first to consult the bishop in case either party earnestly crave the bishop's judgment. That is the judgment, I think, not to be pronounced by the bishop afterwards, but to be pronounced by the Chancellor. That is my own view of the matter, using the best means I can to construe what the patent means.

It has been contended that when once the parties have asked the Chancellor to consult the bishop, then upon that the Chancellor's jurisdiction to deal with the case has gone, and that he has no jurisdiction to hear that cause or to give judgment in it.

I do not think that is so at all. I think he has still jurisdiction to hear the cause and still jurisdiction to give judgment. It is only this, that if the party desire him to do it he is to consult the bishop. I think that is the view taken by Lord

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Campbell in *Ex parte Medwin* (1) of such reservations. I do not, however, attach very much weight to this, because I do not think that the prefatory part of Lord Campbell's judgment in that case was meant to definitely lay down the law one way or the other. It was accepting for the sake of argument a number of facts as being so, but still Lord Campbell does say there that they have examined Dr. Phillimore's patent—which is exactly like this patent of Dr. Tristram's—"and it appears to constitute him, among other things" (2), so and so. "The appointment is for life; and, in large terms, the power is conferred on him, in the absence of the bishop, of presiding in the Consistory Court in all cases within the contentious jurisdiction of the bishop, with certain exceptions not material now; and at the prayer of either party in a suit for the personal judgment of the bishop, he"—that is, the Chancellor —"is to consult him and have his consent to the decree." But it is obvious that Lord Campbell thought the Chancellor was still at liberty to make the decree: he was only to have the bishop's consent to it. I am not sure that that is not expressing it a little too widely, and that if the Chancellor consulted the bishop that would not be sufficient. But take it, at any rate, that the bishop is to consent to the decree, so that it is the bishop's decree in that sense, then all that Dr. Tristram would have to do at any moment before giving his judgment, if the party had made the requisition which they have made in this case, would be to say to the bishop, "I desire to consult you about the case of so and so. I have heard it. I am going to give judgment about it, and the judgment I propose to give is this," and thus at the most to get the bishop to agree that that would be the proper judgment to give. All that he might do out of Court and without any formality.

Now, it is said in this case that, Dr. Tristram having given judgment without consulting the bishop, his jurisdiction was gone. I cannot think so. At the most, it seems to me that he may have used the wrong procedure in the Court. There

(1) 1 E. & B. 609. (2) 1 E. & B. at p. 614.

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are many cases in which a judge acts perfectly within his jurisdiction, and yet he may adopt the wrong procedure; and, if he does adopt the wrong procedure, there is a recognised way of putting him right, and that is by way of appeal; and if there be a proper remedy by appeal, then there is no right to a writ of prohibition.

That is sufficiently laid down, it appears to me, in the case of *Mackonochie* v. *Lord Penzance* (1), in the judgment of Lord Selborne. It had been laid down before that in the same case by Thesiger L.J. in the Court of Appeal, and by Lush J. in the Court of first instance. It seems to me that this being, as I have said, procedure and not jurisdiction, upon the authority of that case there should be no writ of prohibition.

There is this further point. I think that, even if this were a defect of jurisdiction, the defect does not in substance appear upon the proceedings. What is shewn here? It is shewn that the cause was properly instituted and commenced in the Consistory Court. There was a defence put in which contained a plea, and the plea raised this question. The defendants objected that the Chancellor should not proceed to hear and should not give judgment unless he consulted the bishop. The petitioners insisted that the Chancellor should go on, and the Chancellor went on; he heard the case, he gave judgment, and he drew up an order ordering certain things. The order does not say that he did not consult the bishop. It is quite true it does not say that he did, but it leaves it perfectly open upon the face of the proceedings. We may know very well that, as a matter of fact, he did not think it necessary to consult the bishop, but I do not think we can say that that appears upon the proceedings, unless it appears upon what are the pleadings in the case and upon the judgment, so that it appears upon the record.

I therefore think this rule should be discharged.

CHANNELL J. I am of the same opinion. We have, of course, in this case to scrutinise carefully the actual words of

(1) 6 App. Cas. 424.

this patent. In fact, we know that the Chancellor gave judgment upon a view which he entertained that certain things at any rate in this patent were invalid and obsolete forms which had now no operation. That point is not, however, now raised, and it is not contended that the reservations, such as they are, when properly construed are not effective; but it is urged that, nevertheless, this prohibition ought not to go, because the defect, if it is a defect, is one not of jurisdiction but of procedure. Therefore we have to deal with the words of this patent upon the footing that, when properly construed, they are operative. When we examine the patent, what we find is that certain causes are expressly reserved to the bishop himself. Then, in addition to that, there is a general reservation: "Reserved also to us and our successors equally to examine and determine every cause in our proper person in our Court of Consistory." But I think, on the proper construction of this patent, that it is for the bishop to say whether or not he desires to act as judge himself, and since in this case he has not in fact done so, that reservation does not apply here.

That brings us back to the other matter, not, as I quite agree, a reservation but a qualification, upon the authority of the Chancellor, which is contained in an earlier part of the patent, and beginning with the words, "Nevertheless first consulting." Now, in order to see what that means, it is necessary to look at the words coming before it. They begin with giving authority to Dr. Tristram that, "In our absence from our Consistory Court of Lewes, he shall and may proceed by himself." Therefore he may proceed in the absence of the bishop from the Court with a suit instituted in that Court, of which it may be the bishop knows personally nothing whatever. The patent starts by giving Dr. Tristram authority to proceed in the bishop's absence with all manner of suits, and so on, "except hereafter excepted." I read those words to refer undoubtedly to the causes which are afterwards excepted altogether; so that we may leave that out. Then it goes on to give him power 'to decide and finally determine all and singular those the causes aforesaid." So that there is first of all, in the absence of the bishop, a power to proceed, and not only to proceed, but

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to decide and finally determine the causes: "Nevertheless first consulting us and our successors, and having our consent in case either party earnestly crave our judgment." First, before what? First, clearly, before deciding and finally determining, because that is the power that is given by the patent immediately before. What is the meaning of the words, "and having our consent"? Surely that means not having our consent to the judgment, but having our consent to his dealing with the matter at all. So that it stands thus: authority in the absence of the bishop to deal with the matter, and to go on to finally decide it, unless the parties crave the bishop's judgment, and then the Chancellor is to consult the bishop, and obtain the bishop's consent to his dealing with the matter and deciding it. That is what the meaning of that seems to be. I think that this qualification relates to cases in which Dr. Tristram has by the patent power to act in the bishop's absence; and inasmuch as the bishop has, under the general reservation to himself later on in the patent, power to decide all causes himself which he wants to decide, it provides that, in reference to causes which he knows nothing about, before the Chancellor goes on to decide them finally, if he is asked by the parties to do so, he shall ask the bishop whether he wants to dispose of those causes or not. That is what the words seem to mean.

The result is, that I think that the question whether this cause before us is one to which the qualification applies is entirely a matter which is part of the procedure of the Court, and on which an error, if there is one, does not affect Dr. Tristram's jurisdiction. That is to say, that this objection should be taken by way of appeal, and not by way of prohibition.

I agree also that this is not a case in which the objection (if it is a good objection) to the jurisdiction appears upon the face of the proceedings in the sense which Willes J., in his opinion in the case of *Mayor of London* v. *Cox* (1), referred to. It is true that it does not appear upon the record that the bishop was consulted; and as a fact, of course, we know that he was not, and I do not pretend to ignore that fact; but it is not a

(1) L. R. 2 H. L. 239.

case in which the objection to the jurisdiction appears upon the face of the proceedings.

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Rule discharged.

Solicitors for applicants: *Brooks, Jenkins & Co.*
Solicitor for respondents: *Grantham R. Dodd.*

A. P. P. K.

FOULGER *v.* ARDING.

1901
April 19, 20.

Landlord and Tenant—Lease—Covenant by Lessee to Pay and Discharge "Impositions" charged or imposed in respect of the Premises—Order by Sanitary Authority on Lessee to abate Nuisance—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76).

A lease for years contained a covenant by the lessee to "pay and discharge all taxes rates including sewers main drainage assessments and impositions whatsoever which now are or at any time hereafter during the continuance of the said term hereby granted be taxed rated assessed charged or imposed upon or in respect of the said premises or any part thereof or on the landlord tenant or occupier of the same premises by authority of Parliament or otherwise howsoever (landlord's property tax and tithe only excepted)." There was no repairing covenant in the lease. Notice was given to the lessor by the sanitary authority of the district, under the Public Health (London) Act, 1891, to abate a nuisance caused by a foul and offensive privy on the premises by removing the privy and constructing a water-closet in accordance with the by-laws of the London County Council. The lessor thereupon did the work required in the notice, and subsequently sued the lessee to recover the expense incurred in so doing:—

Held, that this expense was not covered by the words "impositions charged or imposed upon or in respect of the premises" in the covenant, and therefore that the lessee was not liable.

APPEAL from a decision of the deputy judge of the Wandsworth County Court.

The action was brought to recover damages for the breach of a covenant in a lease.

The following facts were admitted at the trial in the county court:—

The defendant was tenant to the plaintiff of a dwelling-house and premises in the parish of Streatham under a lease for a term of sixteen years from June 24, 1892. The lease contained

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the covenant by the tenant which is set forth in the head-note to this report. It contained no covenant to repair either by the landlord or the tenant.

In August, 1900, during the continuance of the demise, the plaintiff received from the sanitary inspector of the parish of Streatham, an officer of the Wandsworth District Board of Works, a notice requiring the plaintiff, as owner of the house and premises, to abate a nuisance thereon arising from a foul and offensive privy, defective soil-pipe, &c., by removing the privy and building a water-closet in accordance with the by-laws of the London County Council. The plaintiff, after communicating with the defendant, who repudiated any liability in the matter, did the work required by the notice at the cost of 35*l.*, which sum the plaintiff paid. It was not disputed that the work was such as the landlord could properly be required to do by the sanitary authority under the Public Health (London) Act, 1891. (1) The defendant having, on demand by the plaintiff, refused to pay that sum, this action was brought to recover it under the covenant in the lease.

The deputy county court judge held that the expense incurred by the plaintiff came within the words of the covenant—

(1) By the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 2, "Any water-closet, earth closet, privy, &c., so foul or in such a state as to be a nuisance or injurious or dangerous to health, shall be nuisances liable to be dealt with summarily under the Act."

By s. 4, The sanitary authority may, where the nuisance arises from any want or defect of a structural character, serve a notice upon the owner of the premises requiring him to abate the same within the time specified in the notice, and to execute such works and do such things as may be necessary for that purpose, which works may be specified by the sanitary authority.

By s. 5, If the person on whom the notice to abate a nuisance has been served makes default in complying with any of the requisitions thereof within the time specified, the sanitary authority shall make a complaint, and the petty sessional court hearing the complaint may make a nuisance order, which may be an abatement order.

By s. 10, Where a nuisance order has not been complied with, the sanitary authority shall have a right to enter the premises for the purpose of executing the order.

By s. 11, "All reasonable costs and expenses incurred in serving notice, making a complaint, or obtaining a nuisance order, or in carrying the order into effect, shall be deemed to be money paid for the use and at the request of the person on whom the order is made."

"impositions . . . . imposed in respect of the premises," and gave judgment for him for 35*l.* accordingly.

The defendant appealed.

Colam, for the appellant. The covenant does not impose any obligation upon the tenant to pay this expense which his lessor has incurred. The word "impositions" is the only word which could cover it, and by "impositions" is meant something ejusdem generis as taxes and rates. The decisions in *Tidswell* v. *Whitworth* (1) and *Rawlins* v. *Briggs* (2) apply. There is no covenant to repair in the lease, and the expense was in respect of a structural repair which, primâ facie, it was the lessor's duty to do. There is no such word as "duty" in the covenant, as in *Brett* v. *Rogers* (3) and *Farlow* v. *Stevenson*. (4) Those cases, therefore, and similar ones in which the word "duty" or the word "charge" occurred in the covenant, are distinguishable. In *Badcock* v. *Hunt* (5) a water rate was held not to be an "imposition" within the meaning of the covenant.

Clavell Salter, for the respondent. The tenant is liable under the covenant. On the true construction of it, apart from authority, the word "including" does not govern the word "impositions." The words "including sewers main drainage assessments" should be read as if they were in a parenthesis. Both on the construction of the covenant and on the authorities the expense which the landlord has incurred is an "imposition" within the meaning of the covenant. It is a charge imposed upon the premises. In *Smith* v. *Robinson* (6) the words of the covenant were "to pay bear and discharge all land tax sewers rate main drainage rate and all other rates taxes assessment charges or impositions whatsoever . . . . charged assessed or imposed upon the said demised premises or on the lessor for or in respect of the premises," and the Court held that expenses incurred by the lessor in repairing a drain in pursuance of an order of the sanitary authority were a "charge imposed on the lessor in respect of the premises"

(1) (1867) L. R. 2 C. P. 326.
(2) (1878) 3 C. P. D. 368.
(3) [1897] 1 Q. B. 525.
(4) [1900] 1 Ch. 128.
(5) (1888) 22 Q. B. D. 145.
(6) [1893] 2 Q. B. 53.

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within the covenant. There is no difference between a "charge imposed" and an "imposition charged," which are the words here. The distinction which runs through the cases is between charges imposed on the premises and charges imposed on the person. Where the charge is imposed on the person, as in *Tidswell* v. *Whitworth* (1) and *Rawlins* v. *Briggs* (2), the covenant has been held not to apply to make the tenant liable for the expense of repairs or work done by the landlord under a duty imposed on him; but where the covenant refers to a "charge" or "duty" imposed on or in respect of the premises, as in *Thompson* v. *Lapworth* (3), *Hartley* v. *Hudson* (4), *Brett* v. *Rogers* (5), and *Farlow* v. *Stevenson* (6), the tenant is liable. *Brett* v. *Rogers* (5) is an authority to shew that, if the covenant applies, the landlord is entitled to recover from the tenant, where the landlord has done the work himself on notice from the local authority, just as much as if he had waited for the local authority to come in and do it. The object of such covenants as this is to ensure that the landlord shall get his rent clear of all deductions.

Colam replied.

LORD ALVERSTONE C.J. These cases often present difficulties not so much from the questions of law involved as from the fact that these covenants have from time to time been modified, in view of the decisions upon them, in order to put a greater or less liability—generally a greater—upon the tenant. In the present case, however, I think we are obliged to reverse the decision of the learned deputy county court judge, and to say that the covenant should have a different construction from that which he has put upon it. The lease was for sixteen years from June 24, 1892, and in it neither the lessor nor the lessee undertook any obligation to repair. I agree that if the words of the covenant are clear to impose the liability upon the tenant it is not material whether the lease contains a repairing covenant or not, but I think that fact does become

(1) L. R. 2 C. P. 326.
(2) 3 C. P. D. 368.
(3) (1868) L. R. 3 C. P. 149.
(4) (1879) 4 C. P. D. 367.
(5) [1897] 1 Q. B. 525.
(6) [1900] 1 Ch. 128.

naterial as an assistance in construing the covenant where its anguage is doubtful or ambiguous. In order to make the enant liable you have to find in the covenant a contract or ndertaking by the tenant to indemnify the landlord against he particular charge or expense which the landlord has had to ay, and you are to construe the covenant and fix the obligation y looking at the terms of the covenant, and I think of the ease also, to see whether or not such a contract or under-aking exists. It is for that reason that the authorities have ivided themselves into two groups—first, where covenants, n whatever words, have been held a contract or undertaking y the tenant to indemnify the landlord in respect of a duty r obligation imposed upon him; and, secondly, where the ovenant is only to indemnify him against charges upon the remises—i.e., money charges only. The cases are not, in my iew, satisfactory. As an illustration of the difficulty there is n applying the decision in one to the covenant in another I nay refer to *Brett* v. *Rogers*. (1) The covenant was "to pay he land tax sewers rate and all other taxes rates duties ssessments and impositions parliamentary parochial or other-vise . . . . assessed or imposed on or in respect of the demised remises." The Court seems to have held that the landlord's bligation to take up a defective drain and lay a new one was "duty" imposed on him in respect of the premises; but, as ointed out by Mr. Foa in his able work on the Law of Landlord and Tenant, 3rd ed. p. 174, the words "to pay uties" do not in their ordinary sense apply to an act to be erformed, but appear to relate to the payment of a sum of noney due. Within which line of authorities does the case ow before us lie? On the one hand there are the decisions n favour of the tenant, such as *Tidswell* v. *Whitworth* (2) nd *Rawlins* v. *Briggs*. (3) The ground of decision in those ases was that you could not find in the covenant a clear ndertaking by the tenant to indemnify the landlord against ither a payment he had to make or an obligation which had een imposed upon him. On the other hand are the decisions

(1) [1897] 1 Q. B. 525. (2) L. R. 2 C. P. 326.
(3) 3 C. P. D. 368.

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against the tenant, which begin with *Thompson* v. *Lapworth* (1) and end with *Farlow* v. *Stevenson* (2), and in those cases you were able to find such an undertaking. In one of them—*Smith* v. *Robinson* (3)—which was pressed upon us as coming very near the case before us, Wright J. thus summed up the decisions in favour of the tenant: "Tenants have got off in cases where no such word has occurred as 'charge,' 'duty,' or 'outgoings,' or where there have been no words extending to charges upon the owner, or where there are words indicating an intention that the landlord is to pay; but where the words are sufficient we must hold the governing intention to be that the owner shall get his rent clear of all deductions." I now endeavour to apply the principle to be derived from these different decisions and dicta to the present case. The covenant is: [His Lordship read it]. On the construction of the language apart from authority, I think that the word "including" governs the word "impositions." It was strongly argued, in favour of the landlord, that an "imposition charged upon or in respect of the premises" is the same thing as a charge imposed upon or in respect of the premises, and that this was a charge imposed in respect of the premises. But the answer is that the word "impositions" is not in this case meant to refer to any duty or obligation to do any repairs or work in respect of the premises. In saying this I am not solely relying upon the argument that "impositions" are meant to be something ejusdem generis as taxes and rates, though that argument has some weight; but I think that the tenant only agreed to indemnify the landlord against something which was a money charge or tax imposed on the premises. I come to the conclusion, although with great hesitation, that the words of the covenant are not sufficient to cover this expense. What the landlord has had to do was to make good a structural defect in the premises. It was not the result of a nuisance committed by the tenant or of anything done by him, or for his benefit: it was an expense incurred by the landlord in doing something which the local authority could call upon him to do in order to remedy a

(1) L. R. 3 C. P. 149. (2) [1900] 1 Ch. 128.
(3) [1893] 2 Q. B. 53.

structural defect. Where the lease contains no covenant to repair by the tenant one ought to find very clear words in the covenant in order to put upon him an obligation to indemnify his landlord in respect of such an expense. I am of opinion that our judgment should be for the appellant.

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LAWRANCE J. I am of the same opinion for the same reasons.

Judgment for appellant. Leave to appeal.

Solicitor for appellant: *G. Aplin Nichols.*
Solicitors for respondent: *Foulger & Robinson.*

W. A.

THE KING *v.* GROOM AND OTHERS. *Ex parte* COBBOLD AND OTHERS.

1901
April 20.

Licensing Acts—General Annual Licensing Meeting—Adjournments—Power of Justices to Adjourn into October—Alehouse Act, 1828 (9 *Geo.* 4, *c.* 61), *s.* 3—*Wine and Beerhouse Act*, 1870 (33 *&* 34 *Vict. c.* 29), *s.* 11.

Where a full licence to sell intoxicating liquors, under 9 Geo. 4, c. 61, is applied for at an adjourned general annual licensing meeting held in September, the justices have no power to adjourn that meeting to a date after the end of September in order to allow the applicant, who has not given sufficient notice of his application, to give fresh notices.

RULE, for a writ of certiorari to bring up and quash an order of justices for the borough of Harwich, by which order J. K. White was granted a provisional licence authorizing him to hold any of the excise licences that might be held by a publican for the sale of intoxicating liquor, to be consumed either on or off the premises, at a house then in course of erection within the borough.

The following facts appeared from the affidavits used on the application for the rule:—

The adjourned general annual licensing meeting for the borough of Harwich was held on September 25, 1900, and J. K. White applied at that meeting for the provisional licence in question. His application was opposed by two firms of

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brewers in the borough. When the application was called on, the applicant's solicitor adduced evidence to prove the due service of notice of the application; and it then appeared that a copy of the notice had been served upon the superintendent of police nineteen days before the adjourned meeting, being two days short of the twenty-one days prescribed by the Licensing Acts. This, it was alleged, was owing to the sudden illness of the person employed to serve the notice. Upon the application of the solicitor for the applicant the justices adjourned the licensing meeting to October 23, 1900, in order to enable notices to be properly served. The adjournment was objected to by the solicitor who appeared for the opposing firms of brewers. On October 23, 1900, the application again came on for hearing, and objection was taken by the brewers' solicitor that the justices had no power to adjourn the licensing meeting into the month of October, or to sit as licensing justices in that month; and, therefore, that they had no jurisdiction to entertain the application for a licence.

The justices overruled this objection, and in the result granted to J. K. White the provisional licence applied for, their order being confirmed at a meeting held on November 6, 1900, when the same objection was again taken.

This rule was thereupon obtained on behalf of the brewers.

C. E. Jones, for the applicant for the licence, shewed cause. This rule has been obtained by brewers who own public-houses in the borough, and are, therefore, rivals in trade; but they have no interest in the particular house in respect of which the licence has been granted, and they are not "persons aggrieved." In *Reg.* v. *Nicholson* (1) Vaughan Williams L.J. pointed out (2) that the practice of the Courts has always been to insist that persons applying for a writ of certiorari should be persons who are aggrieved.

Next, the justices had power to adjourn the licensing meeting until October 23, and therefore had jurisdiction to make the order granting the licence and the confirming order. By s. 2 of the Alehouse Act, 1828, the date of the general annual

(1) [1899] 2 Q. B. 455. (2) [1899] 2 Q. B. 471.

licensing meeting is to be fixed by justices at petty sessions. By s. 3 (1) they are required to adjourn that meeting to such day or days as they may deem most convenient for persons applying for licences, and there is a proviso that every adjournment shall be holden within the months of August and September in counties other than Middlesex and Surrey.

Under s. 7 of the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), and s. 40 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), the notice of an application for a licence is a twenty-one days' notice. It is submitted that the justices had power to adjourn the adjourned meeting of September 25 into October in order to allow the notices to be properly given. It has been held—in *Reg.* v. *Justices of the West Riding, Drake's Case* (2) —that a notice given twenty-one days before the adjourned meeting is good. The general annual licensing meeting may, by s. 1 of the Alehouse Act, 1828, be held on any day between August 20 and September 14 inclusive. It follows that, if it was fixed on the latter day, the justices must adjourn into October if the notice is to be given for the adjourned meeting.

Further, s. 11 of the Wine and Beerhouse Act, 1870 (3), alters

(1) 9 Geo. 4, c. 61, s. 3: "And be it further enacted, that it shall be lawful for the justices acting at the general annual licensing meeting, and they are hereby required, to continue such meeting by adjournment to such day or days, and to such place or places within the division or place for which such meeting shall be holden, as such justices may deem most convenient and sufficient for enabling persons keeping inns within such division or place to apply for such licence: Provided, nevertheless, that the adjourned meeting to be holden next after such general annual licensing meeting shall not be so holden in or upon any of the five days next ensuing that on which such general annual licensing meeting shall have been holden as aforesaid, and that every adjournment of the said general annual licensing meeting shall be holden within the month of March in the counties of Middlesex and Surrey, and of August or September in every other county."

(2) (1869) L. R. 5 Q. B. 33.

(3) 33 & 34 Vict. c. 29, s. 11: "Where any applicant for the grant or renewal of a certificate has, through inadvertence or misadventure, failed to comply with any of the preliminary requirements of the principal Act or this Act, or any Act incorporated therewith, the justices may, if they shall so think fit, and upon such terms as they think proper, postpone the consideration of the application to an adjourned meeting, and if at such adjourned meeting the justices shall be satisfied that such terms have been complied with, they may proceed to grant or withhold such certificate as if

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and extends the proviso at the end of s. 3 of the Alehouse Act, 1828, in cases where the applicant for a licence has, through inadvertence or misadventure, failed to comply with any of the preliminary statutory requirements. In those cases the justices may, in their discretion, adjourn to a day beyond September. In *Reg.* v. *Justices of Denbigh* (1) the licensing justices had adjourned the general annual licensing meeting into October, and the Court made absolute a rule for a mandamus commanding them to hear and determine the application for a licence. That decision is in point here. In *Reg.* v. *Justices of Anglesea* (2) Hawkins J. expressed his opinion that the general annual licensing meeting continues for all purposes of granting or refusing licences from the moment of its commencement until the last moment of the adjourned meeting or meetings as if the first meeting and every adjourned meeting were all one meeting held on one single day. In *Webber* v. *Justices of Birkenhead* (3) there was no question of inadvertence or misadventure. Ridley J.'s decision, therefore, in that case is not against the view contended for here.

Rawlinson, K.C. (*Ernest Wild* with him), in support of the rule. The proviso to s. 3 of the Alehouse Act, 1828, applies to this case, and the justices had no power to adjourn into October. The application was for a full alehouse licence. Sect. 11 of the Wine and Beerhouse Act, 1870, applies only to applications for grants or renewals of certificates in respect of the sale of beer, wine, and cider under that and the principal Act; it does not alter or affect the provisions of s. 3 of the Act of 1828. *Reg.* v. *Justices of Denbigh* (1) does not govern the present case. The application was for a mandamus to compel the justices to hear and determine—i.e., to compel them to do what they ought to have done in September. The decision of Ridley J. in *Webber* v. *Justices of Birkenhead* (3) is an authority in favour of the rule.

The applicants for the rule here are persons aggrieved by the

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the preliminary requirements of the principal Act had been complied with."

The "principal Act" referred to is the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27).

(1) (1895) 59 J. P. 708.

(2) (1895) 59 J. P. 743.

(3) (1897) 61 J. P. 664.

justices' decision. They are persons who have an interest in the matter of the application for a licence, and are, therefore, entitled to a certiorari: *Reg.* v. *Justices of Surrey* (1); *Reg.* v. *Nicholson.* (2) [He also referred to *Reg.* v. *Justices of London.* (3)]

LORD ALVERSTONE C.J. With great regret I come to the conclusion that this rule should be made absolute. If I could see my way to decide against the applicants for a certiorari, who are only rivals in trade of the person to whom the licence has been granted, and are now taking this purely technical objection, I should be glad to do so. But if we were to hold that this licensing meeting could be adjourned as it has been in this case, our judgment would amount to a decision that, under the Act of 1828, an adjourned general annual licensing meeting to receive original or fresh notices could be held in the month of October. I think that would be going too far. Sect. 3 of the Act of 1828 clearly contemplates that the general annual licensing meeting and every adjournment of it shall be held in the month of August or September. Primâ facie, therefore, that section directs that the licensing work shall be got through by the end of September. It was contended that the justices had power to adjourn the adjourned meeting into October apart from the section in the subsequent Act which deals with the question of inadvertence or misadventure. But if it were competent to the justices, under s. 3, to sit in October, the ground of the judgments in *Reg.* v. *Justices of the West Riding, Drake's Case* (4), would appear to be ill-founded. I should, therefore, apart from any other enactment, come to the conclusion that an adjourned meeting to receive fresh notices could not be held in the month of October. We have next to consider s. 11 of the Act of 1870, which, if it applied, would cover what has been done in this case. That section allows an adjournment where an applicant for the "grant or renewal of a certificate" has, through inadvertence or misadventure, failed to comply with any of the preliminary requirements of "the principal Act or this Act, or any Act incorporated therewith."

(1) (1870) L. R. 5 Q. B. 466.
(2) [1899] 2 Q. B. 455.
(3) [1895] 1 Q. B. 616.
(4) L. R. 5 Q. B. 33.

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I should be glad if I could see my way to holding that the provisions of s. 11 were attracted to the Act of 1828; but I do not think they are. It is true that s. 8 of "the principal Act" (the Wine and Beerhouse Act, 1869) applies provisions of the Alehouse Act, 1828; but they are only applied to "grants of certificates under this Act." If s. 11 had been intended to apply to every licence, one would not find language limiting its application to grants or renewals of certificates under the Act of 1870 and grants of certificates under the Act of 1869. With regard to *Reg.* v. *Justices of Denbigh* (1), it is to be observed, in the first place, that the application was for a mandamus to the justices to hear and determine, and that may be the reason of the decision, and there is also a doubt whether the Court did not think the case came within the provisions with respect to renewals of licences of s. 42, sub-s. 2, of the Licensing Act, 1872. Ridley J., in *Webber* v. *Justices of Birkenhead* (2), seems to have thought that was the explanation of *Reg.* v. *Justices of Denbigh.* (1) As to the question whether the applicants for the rule are persons aggrieved, there can be no doubt that they have no real grievance arising from the omission to serve the notice in time. That, however, is not the sense in which persons applying for a certiorari are required to be persons aggrieved. It is sufficient if they have a real interest in the decision of the justices, and they have in this case. They took the point now raised before the justices at the adjourned general annual licensing meeting and when the confirming order was made, and it would be too strong to say that they had not a sufficient interest in the matter to enable them to apply for the rule.

I am, therefore, of opinion that the rule should be made absolute.

LAWRANCE J. I concur.

Rule absolute.

Solicitors for applicant for licence: *Gibbs, White & Strong.*

Solicitors for applicants for a certiorari: *Godden, Son & Holme.*

(1) 59 J. P. 708. (2) 61 J. P. 664.

W. A.

STEAD, Appellant *v.* NICHOLAS, Respondent.

1901
April 30.

Fishery Acts—Fishery District—Definition of Limits by Board of Trade Certificate—River—Reservoir—Salmon Fishery Act, 1865 (28 & 29 *Vict. c.* 121), *s.* 35—*Freshwater Fisheries Act*, 1878 (41 & 42 *Vict. c.* 39), *ss.* 6, 7.

Sect. 6 of the Freshwater Fisheries Act, 1878, which extends the provisions of the Salmon Fishery Acts relating to fishery districts to "all waters within the limits of this Act frequented by trout or char," does not give fishery boards jurisdiction over waters of a different character from those referred to in the Salmon Fishery Acts, and has, therefore, no application to an artificial reservoir although it is frequented by trout or char.

Case stated by two justices for the West Riding of the county of York.

On October 15, 1900, an information was preferred by Stead, the appellant, who was the chief water bailiff of the Yorkshire Fishery Board, against Nicholas, the respondent, under s. 35 of the Salmon Fishery Act, 1865 (1), as extended to trout or char by ss. 6 and 7 of the Freshwater Fisheries Act, 1878, for that he, on September 29, 1900, at Thrybergh, in the West Riding of the county of York, unlawfully did fish with a rod and line for trout without a proper licence from the fishery board.

The justices at the hearing found the following facts:—

The Thrybergh Reservoir is the property of the corporation

(1) By s. 35 of the Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), "From and after a time to be appointed . . . . in a fishery district any person fishing in that district with a rod and line for salmon without a proper licence shall be liable to a penalty. . . . ."

By s. 6 of the Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), "The provisions of the Salmon Fishery Acts, 1865 and 1873, which relate to the formation, alteration, combination, and dissolution of fishery districts, and to the appointment, qualification, proceedings and powers of conservators . . . . shall extend and apply to all waters within the limits of this Act frequented by trout or char. . . . ."

By s. 7, "In any fishery district subject to a board of conservators the conservators shall have power to issue licences . . . . to all persons fishing for trout or char, and in the event of the power being exercised in any fishery district the provisions of the . . . . thirty-fifth . . . . section of the Salmon Fishery Act, 1865 . . . . shall with respect to such district be construed as if the words 'trout or char' were inserted throughout after the word 'salmon.'"

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of Doncaster, constructed under the powers conferred by the Doncaster Waterworks Act, 1873, and is a storage reservoir. The waters of a small brook, known as Silverwood Brook, are impounded in the said reservoir, and conveyed thence by pipes for domestic use in the borough of Doncaster.

Two other subsidiary reservoirs in an adjoining valley supply compensation water for the use and benefit of riparian owners whose water supply was interfered with by the construction of Thrybergh Reservoir. In the event of failure to supply compensation water from the subsidiary reservoirs referred to, such water can be and occasionally is supplied from the Thrybergh Reservoir. When such supply is necessary from the Thrybergh Reservoir it is effected by means of a valve. No fish can enter the Thrybergh Reservoir from the old course or channel of the brook below the reservoir, and no water passes from the reservoir into the ancient course or channel of the brook unless allowed to pass through the valve under the circumstances referred to.

The channel or old course of the brook below the reservoir joins the Hooton Brook, which latter flows into the river Don near Kilnhurst. The river Don flows into the river Ouse.

The Thrybergh Reservoir has been stocked with trout brought from a distance by the corporation of Doncaster. Persons fishing therein must obtain a ticket from the corporation for which payment is made. The proceeds arising from the sale of the tickets are devoted to the purchase of trout which are placed in the reservoir, by which means the stock is maintained.

The limits and bounds of the Yorkshire Fishery District were originally defined and declared by the Home Secretary by certificate given by virtue of the powers given by the Salmon Fishery Acts, 1861 to 1873, and in such certificate were then declared to comprise (inter alia) "so much of the rivers Derwent, Wharfe, Nidd, Ure, Swale, Ouse, and Humber and their tributaries as lies within the county of York;" but the limits of the said Yorkshire Fishery District were subsequently, by certificate dated January 21, 1896, of the Board of Trade, acting under the powers conferred by s. 3 of the Salmon and Freshwater Fisheries Act, 1886 (49 & 50 Vict. c. 39), altered, extended, and defined as follows: "The limits of the rivers

Derwent, Wharfe, Nidd, Ure, Swale, and Ouse, and the fishery district of the said rivers include all such estuaries, rivers, streams, brooks, lakes, ponds, canals, dykes, cuts, drains, channels, watercourses, and waters as lie within" the limits defined by certain lines and boundaries in the said certificate set forth and described.

The Thrybergh Reservoir is situate in that part of the West Riding which is within the limits of the said Yorkshire Fishery District, as defined by the lines and boundaries in the said last-named certificate so set forth and described.

The appellant was duly appointed by the Yorkshire Fishery Board their water bailiff.

On September 29, 1900, the respondent was found fishing for trout by the appellant in the Thrybergh Reservoir. He was duly authorized to fish therein by ticket granted by the corporation of Doncaster, but was not in possession of and had not obtained any licence authorizing him to fish for trout from the Yorkshire Fishery Board within the district under their jurisdiction.

The appellant submitted that the licence was requisite, and that any person fishing for trout in any inclosed waters within the limits of the district of the board without having obtained it was liable to a penalty under s. 35 of the Salmon Fishery Act, 1865.

It was contended for the respondent that the Yorkshire Fishery Board had no jurisdiction over the Thrybergh Reservoir, and that no licence from the board was required by persons fishing for trout therein, and that if the certificate of the Board of Trade of January 21, 1896, did include the reservoir within the Yorkshire Fishery District, the certificate was ultra vires, and was not authorized by any of the Acts of Parliament under or by virtue of which it was issued and given.

The justices dismissed the information, but on the application of the appellant stated this case for the opinion of the Court.

Avory, K.C. (*H. T. Waddy* with him), for the appellant. The justices were wrong. They were influenced by the decision

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in *George* v. *Carpenter* (1), which has no application here. The certificate of the Secretary of State defining the fishery district in that case was in quite different terms to that in the present case, and it would have been necessary to say that the reservoir in that case was a tributary of the river Severn, which the Court were unable to do. Here the certificate is in much wider language, and includes in the fishery district all "estuaries, rivers, streams, brooks, lakes, ponds, canals, dykes, cuts, drains, channels, watercourses, and waters" within certain limits. The certificate was not ultra vires. The Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), no doubt was limited to salmon rivers, and there was no definition of the jurisdiction of fishery boards. But by the Salmon Fishery Act, 1865, s. 3, the word "river" was defined to include such portion of any stream or lake with its tributaries as may from time to time be declared to belong to such river, and, by s. 5, the limits of a river and of a fishery district were to be defined by the certificate of a Secretary of State, now the Board of Trade. Then, by the Freshwater Fisheries Act, 1878, the provisions of the Salmon Fishery Acts were extended to "all waters within the limits of this Act frequented by trout or char." The "limits of this Act" are explained by s. 3: "This Act shall not extend to Scotland or Ireland, nor . . . . to the counties of Norfolk and Suffolk and the county of the city of Norwich." The object of the Act was to extend the jurisdiction of fishery boards to all waters frequented by trout or char, and the decision of the justices would confine that jurisdiction to salmon rivers and their tributaries.

T. W. Chitty, for the respondent. The decision of the justices was right. There is no power to extend the jurisdiction of fishery boards to such a reservoir as this. The Freshwater Fisheries Act, 1878, has to be read with the Salmon Fishery Acts, 1861 to 1876, which apply only to waters connected with the sea—that is to say, to rivers or tributaries of rivers. They have no application to artificial water such as a reservoir, and the certificate of the Board of Trade cannot give a fishery board rights over any such water. The expression in s. 6

(1) [1893] 1 Q. B. 505.

in the Act of 1878, "all waters within the limits of this Act," can only refer to the kind of waters mentioned in the earlier Acts.

Avory, K.C., replied.

LORD ALVERSTONE C.J. Speaking for myself, I should have been very glad if I could have adopted the view presented to us by the counsel for the appellant as to this matter. I think that it would be a very good thing if any water frequented by trout was brought within the provisions of the Fisheries Acts. It seems to me, however, that the course of legislation has made that view impossible for us to take. There was a well-known code of law with regard to salmon fishery waters, and trout were protected to a certain extent if they happened to be found in a salmon river. The Act of 1878 does not make any fresh enactment, but merely extends the provisions of the Salmon Fisheries Acts with regard to the formation and alteration of fishery districts to all waters within the limits of that Act frequented by the trout or char. I quite agree that it is possible to construe those words as meaning any water within England other than Norfolk and Suffolk and the county of the city of Norwich, but I think that would be rather an unusual meaning to give to the word "limits." I think that the real answer to the argument for the appellant is this: When the provisions of the Acts of 1865 and 1873 as to the formation of districts are examined, it is plain that they relate to salmon rivers, and the decisions thereon which held that the waters which are within the jurisdiction of the fishery authorities in such districts must be tributaries of the river or must communicate with the river apply equally to the Act of 1878. I further think that the fishery district is not something separate from the river, but that the fishery district referred to in s. 5 of the Act of 1865 is a district which is formed of more than one river. If that is so, the course of legislation was to apply to trout and char rivers (that is to say, rivers in which there need not be salmon, but where there are trout or char) all the provisions of the previous Salmon Fisheries Acts. It would, in my opinion, be too strong to say that the restrictions on

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that which could be included in a fishery district were done away with by legislation by incorporation. Therefore, with regret I come to the conclusion that this refusal to convict was right, and that the reservoir is not and cannot at present be included in the words "all waters within the limits of this Act."

LAWRANCE J. I have unwillingly come to the same conclusion. It seems to me that what was intended to be done by the Act of 1878 was to extend to trout and char the same protection that had been extended to salmon by the Salmon Fishery Acts; but I do not think that the jurisdiction of fishery boards was extended by the Act further, in regard to the kind of waters over which they had jurisdiction, than was already the case in regard to salmon. I therefore think the magistrates were right in the view they took.

Appeal dismissed.

Solicitors for appellant: *Steavenson & Couldwell, for J. E. Jones, York.*

Solicitors for respondent: *Coode, Kingdon & Cotton, for Town Clerk, Doncaster.*

A. P. P. K.

HAWKINS, APPELLANT; EDWARDS, RESPONDENT.

1901
April 19.

Local Government—By-law—Hackney Carriage—Licence—Carriage Plying or Driven for Hire—Concealment of Number-plate—Town Police Clauses Act, 1847 (10 & 11 *Vict. c.* 89), *s.* 38.

A by-law made under the Town Police Clauses Act, 1847, provided that "every proprietor of a hackney carriage" should cause the number of the licence granted to him in respect of that carriage to be marked on a plate fixed on the outside of the carriage, and should not cause or suffer the plate to be concealed from public view "while such carriage may stand, ply, or be driven for hire." By s. 38 of the Town Police Clauses Act, 1847, every wheeled carriage "used in standing or plying for hire in any street" shall be deemed to be a hackney carriage within the meaning of the Act.

The proprietor of a hackney carriage licensed under the Act, having received an order for a carriage to take a person from his house to a railway station, sent the licensed carriage direct from the yard with the number-plate concealed from view by a board placed over it, and in that condition the carriage was driven from the house of the person who had given the order to the railway station along a street within the district to which the by-law applied. The proprietor having been convicted by justices of an offence against the by-law:—

Held, that the carriage, whilst it was so being driven along the street, was a "hackney carriage" within the meaning of s. 38 of the Town Police Clauses Act, 1847; that the by-law applied to it; and that the conviction was, therefore, right.

CASE stated, under the Summary Jurisdiction Acts, by two justices of the city of Birmingham.

The respondent, a superintendent of police, preferred an information against the appellant charging him with an offence against a by-law made for the city of Birmingham, namely, that he unlawfully and negligently suffered a numbered plate on a hackney carriage, of which he was the licensed proprietor, to be concealed from public view whilst the carriage was being driven for hire.

The by-law in question was made under s. 68 of the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), and was, so far as material, as follows:—

"Every proprietor of a hackney carriage shall cause the

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number of the licence granted to him in respect of such carriage to be painted or marked on a plate in figures . . . . and on a second plate in figures. . . . . He shall cause the first of such plates to be fixed on the outside, and the second of such plates on the inside, of such carriage in such a position and manner that the number thereon shall be at all times distinctly and plainly visible and legible. He shall not wilfully or negligently cause or suffer any such plate, or the number of any such outside plate, to be in any manner or by any means concealed from public view, or to be inverted at any time while such carriage may stand, ply, or be driven for hire."

Sect. 37 of the Town Police Clauses Act, 1847, provides that "the commissioners may from time to time license to ply for hire within the prescribed distance . . . . such number of hackney coaches or carriages . . . . as they think fit."

By s. 38, "Every wheeled carriage, whatever may be its form or construction, used in standing or plying for hire in any street within the prescribed distance, and every carriage standing upon any street within the prescribed distance, having thereon any numbered plate required by this or the special Act to be fixed upon a hackney carriage, or having thereon any plate resembling or intended to resemble any such plate as aforesaid, shall be deemed to be a hackney carriage within the meaning of this Act; and in all proceedings at law or otherwise the term 'hackney carriage' shall be sufficient to describe any such carriage."

At the hearing of the information it was proved before the justices that the appellant was the proprietor of a carriage licensed as a hackney carriage under the Town Police Clauses Act, 1847, and having on it the numbered plates required by the by-law; that on the date mentioned in the information the carriage was driven along the street by one Deeley, who was not a licensed driver, with the outside number-plate covered over with a board, which was made to slide into a groove so that the number was not visible; that Deeley had received a specific written order from the appellant's manager to take the carriage direct from the appellant's yard to a house in the city and there pick up and take a gentleman, who had previously

ordered the carriage, to a railway station; that Deeley had done so, and that the gentleman was in the carriage when it was found being driven along the street with the number-plate so covered up.

The justices were of opinion that the carriage, whilst so being driven by Deeley with the number-plate covered, was a "hackney carriage" within the meaning of the by-law, and they convicted the appellant accordingly. The question for the opinion of the Court was whether this decision was right.

William Wills (*A. A. Bethune* with him), for the appellant. At the time of the alleged offence the appellant's carriage was not a "hackney carriage" within the definition in s. 38 of the Town Police Clauses Act, 1847; the by-law, therefore, did not apply to it. On the true construction of s. 38 a carriage is to be deemed to be a hackney carriage only during the time it is either being actually "used in standing or plying for hire in any street," or is standing upon any street with a number-plate on it, and the by-law only applies to a carriage whilst it is standing, plying, or being driven for hire as a hackney carriage. Sects. 46, 47, and 48 contain provisions with respect to drivers of hackney carriages licensed "to ply for hire." The drivers must also be licensed; but s. 48 seems to imply that there may be occasions on which the proprietor of the licensed carriage may employ a driver who is not licensed. No harm is done to the public or the public interest by allowing the proprietor to use his licensed cab as he could use his unlicensed carriage, and there would be hardship to him if he could not. Here he practically allowed it to be hired as a private carriage. The prescribed fares only can be charged for hackney carriages (ss. 54, 55), and the proprietor would be prevented from letting his licensed cab be hired from the yard by a person who desired to go beyond the prescribed distance at a reasonable fare. There are expressions in the judgment of Kelly C.B. in *Case* v. *Storey* (1), and in the judgment of Cockburn C.J. in *Clarke* v. *Stanford* (2), which support the view that a carriage whilst

(1) (1869) L. R. 4 Ex. 319, at p. 323.

(2) (1871) L. R. 6 Q. B. 357, at p. 359.

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in the proprietor's own yard is not "standing" or "plying for hire."

Hugo Young, K.C. (*R. Berkeley* with him), for the respondent. The justices came to a right conclusion. On the true construction of s. 38 a carriage used from time to time in standing or plying for hire is a "hackney carriage" within the definition for the whole of the period during which it continues so to be used. It does not change its character of hackney carriage from moment to moment. If the contention for the appellant be well founded, a licensed carriage ceases to be a hackney carriage when it goes into the proprietor's yard, and then the local authority have no longer any control over it. The control is given for the benefit of the public, and the true view is that a person who takes the benefit of having his carriage licensed as a hackney carriage must take the burden which that control may involve. It is clear that if this was a hackney carriage it came within the by-law.

[He was stopped.]

William Wills replied.

LORD ALVERSTONE C.J. The point raised in this case is one of some nicety, and requires consideration. I confess I was at first struck with the hardship which, it was said, might arise through holding that a person could not employ his carriage, if it was licensed as a hackney carriage, in any other way than as a hackney carriage. But upon consideration I think the grievance is one which we need not take into account. The general purview of the by-law is to protect the public: the object is to provide for a proper supervision of carriages which are licensed to stand or ply for hire as hackney carriages. I think that if a man elects to have the privilege of keeping a carriage which is licensed, he elects to devote that carriage to the services indicated in the by-law. The words of the by-law, "while such carriage may stand, ply, or be driven for hire," in my view, are merely meant to indicate a period during which the hackney carriage is a thing which must have its number shewn, and we ought not to accede to the argument of the appellant's counsel that the by-law only applies whilst

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the carriage is actually standing, plying, or being driven for hire. I think the right view is that the carriage is licensed for a period, and if used during that period in standing or plying for hire the number must be shewn for the whole period. The language of s. 38 of the Town Police Clauses Act, 1847, means, I think, that every wheeled carriage which is in fact from time to time used in standing or plying for hire is to be deemed to be a hackney carriage for the whole of the period during which it is so from time to time used, and the language of the section does not limit the period to the time during which the carriage is in fact used for standing or plying for hire in a street.

For these reasons I am of opinion that the decision of the magistrates was right, and that our judgment should be for the respondent.

LAWRANCE J. I am of the same opinion.

Judgment for the respondent.

Solicitors for appellant: *T. A. Dennison & Co., for H. G. Tanner, Birmingham.*

Solicitors for respondent: *Caprons, Dalton, Hitchins & Brabant, for H. J. & J. E. Hill, Birmingham.*

W. A.

1901
May 3.

THE KING *v.* THE OVERSEERS OF THE POOR OF CONNAH'S QUAY.

Local Government—Urban District Council—Transfer of Powers of Burial Board—Expenses of Carrying into Execution Burial Acts—Poor-rate—General District Rate—Burial Acts—The Burial Act, 1852 (15 *&* 16 *Vict. c.* 85)—*Local Government Act*, 1894 (56 *&* 57 *Vict. c.* 73), *ss.* 7, 62, 67.

Where an urban district council, under the power given by s. 62 of the Local Government Act, 1894, take over the powers, duties, and liabilities of a burial board within their district, the expenses of carrying the Burial Acts into execution continue to be chargeable upon and payable out of the poor-rate, and are not chargeable upon or payable out of the council's general district rate.

RULE, calling upon the overseers of the poor of the parish of Connah's Quay, in the county of Flint, to shew cause why a writ of mandamus should not issue commanding them to pay out of the poor-rates to the urban district council of Connah's Quay, being the burial board for the same parish, the sum of 150*l.*, being the sum required to defray the expenses of carrying into execution the Burial Acts in the parish, pursuant to the precept of the council to the overseers.

The affidavits used on the hearing of the application for the rule disclosed the following facts:—

In 1882 a burial board was formed for three townships which are now the parish of Connah's Quay, and in that and the following year the burial board borrowed moneys amounting to 1800*l.* by means of terminal annuity deeds which constituted the repayment of those moneys a charge upon the poor-rates of the parish. From 1882 to 1897 the expenses of the board were paid out of the poor-rate upon the certificate of the board.

In 1896 the Connah's Quay Urban District Council was formed for the parish of Connah's Quay by order of the Local Government Board made in September of that year.

On March 3, 1897, the urban district council by resolution took over all the powers and liabilities of the Connah's Quay Burial Board.

In 1897, 1898, and 1899 the accounts payable under the annuity deeds and the expenses of carrying into execution the Burial Acts were paid by the overseers of the poor of the parish to the urban district council upon the certificate of the council.

In July, 1900, a certificate was issued by the council to the overseers certifying that the sum of 150*l.* was required by the council for the purpose of defraying the expenses of carrying into execution the Burial Acts in the parish, and directing the overseers to pay that sum to the treasurer of the council out of the poor-rates of the parish.

The overseers refused to comply with the requisitions of that certificate on the ground that the expenses of carrying into execution the Burial Acts in the parish ought to be paid out of the council's general district rate.

This rule was thereupon obtained on behalf of the council.

Marshall, K.C. (*Jenkin* with him), shewed cause. The expenses in question should be paid out of the general district rate, and not out of the poor-rate. By the Burial Act of 1852 (15 & 16 Vict. c. 85), s. 19, the expenses incurred by the burial board of any parish in carrying the Act into execution are chargeable upon and to be paid out of the poor-rate. By s. 20 the board may, with the sanction of the vestry and the approval of the Commissioners of the Treasury, borrow money and charge the future poor-rates of the parish with the payment thereof and interest. By the Burial Acts Amendment Act, 1857 (20 & 21 Vict. c. 81), s. 4, a local board of health of any district established under the Public Health Act, 1848, may by Order in Council be constituted a burial board; and by 23 & 24 Vict. c. 64, s. 1, a local board so constituted may defray the expenses of carrying into execution the Burial Acts, and pay any moneys borrowed under those Acts, and interest, out of the general district rate. The question here turns upon the Local Government Act, 1894 (56 & 57 Vict. c. 73). Sect. 28 provides: "The expenses incurred by the council of an urban district in the execution of the additional powers conferred on the council under this Act shall, subject to the

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provisions of this Act, be defrayed in a borough out of the borough fund or rate, and in any other case out of the district fund and general district rate or other fund applicable towards defraying the expenses of the execution of the Public Health Act, 1875." Under s. 29 the expenses incurred by the council of a rural district are to be defrayed in manner directed by the Public Health Act, 1875, with respect to expenses incurred in the execution of that Act by a rural sanitary authority—namely, out of the poor-rate. The transfer of the powers of the Connah's Quay Burial Board to the Connah's Quay District Council took place under s. 62, which provides: "Where there is in any urban district, or part of an urban district, any authority constituted under any of the adoptive Acts, the council of that district may resolve that the powers, duties, property, debts, and liabilities of that authority shall be transferred to the council as from the date specified in the resolution, and upon that date the same shall be transferred accordingly, and the authority shall cease to exist, and the council shall be the successors of that authority." The "adoptive Acts" referred to in that section are specified in s. 7, and include (*c*) "the Burial Acts, 1852 to 1885." Those Acts may be adopted by the parish meeting in every rural parish; but if so adopted, the expenses of carrying them into execution come out of the poor-rate. Having regard to the legislation with respect to local boards before the Act of 1894, and to the provisions of the Act itself, it is submitted the intention was that, where an urban district council has taken over the powers of a burial board under s. 62, the expenses of carrying into execution the Burial Acts should be payable out of the general district rate. Sect. 53 may be relied on by the urban district council. Sub-s. 1 provides that where on the appointed day any of the adoptive Acts is in force in a part only of a rural parish, the existing authority under the Act, or the parish meeting for that part, may transfer the powers, duties, and liabilities of the authority to the parish council, subject to certain conditions. Sub-s. 3 provides: "The property, debts, and liabilities of any authority under any of the adoptive Acts whose powers are transferred in pursuance of this Act shall continue to be the

property, debts, and liabilities of the area of that authority, and the proceeds of the property shall be credited, and the debts and liabilities and the expenses incurred in respect of the said powers, duties, and liabilities, shall be charged to the account of the rates or contributions levied in that area, and where that area is situate in more than one parish the sums credited to and paid by each parish shall be apportioned in such manner as to give effect to this enactment." That sub-section applies only to transfers in rural parishes with which s. 53 is dealing; it cannot be made to apply to a transfer by resolution of the urban district council under s. 62. The urban district council may also rely on s. 67, sub-s. 3, which provides: "Where any powers and duties are transferred from one authority to another authority . . . . all debts and liabilities of the first authority incurred by virtue of such powers and duties shall become debts and liabilities of the latter authority, and be defrayed out of the like property and funds out of which they would have been defrayed if this Act had not passed." That section, however, applies only where there is a transfer by force of the Act itself, as under s. 25, which transfers to the council of rural districts the powers, duties, and liabilities of rural sanitary authorities and highway authorities; it does not apply where an urban district council has, by resolution, taken over the powers of a body acting under one of the adoptive Acts. In construing such an Act as this the different sections must be read as applicable only to the bodies indicated by the part of the statute in which each section occurs: *Inglis* v. *Robertson* (1): Lord Halsbury L.C. (2) That rule of construction prevents the application of ss. 53 and 67 to transfers under s. 62. Here sums amounting to 1800*l.* have been borrowed by the burial board, and although the rights of the lender of those sums need not be considered in determining the construction of the Act, it is obvious that the payment of them, and interest, is more properly a charge upon the district rate than upon the poor-rate.

Ralph Bankes, for the overseers, was not called upon to argue in support of the rule.

(1) [1898] A. C. 616. (2) [1898] A. C. at p. 624.

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LORD ALVERSTONE C.J. In this case the Connah's Quay Urban District Council have become the burial board by virtue of the operation of the powers of the Local Government Act, 1894, and they have, as a burial board, made a demand upon the overseers of the poor of that parish to pay out of the poor-rate the money which would have been so payable under the Burial Acts. The facts are that there was a burial board from 1882 to 1897. In March, 1897, there was a resolution of the urban district council to transfer the powers, duties, property, debts, and liabilities of the burial board to the council under the powers given by s. 62, sub-s. 1, of the Act of 1894. It is not disputed that the Burial Acts are among the adoptive Acts specified in that statute, and that the powers given by them are now to be exercised by this urban district council. Sect. 67 of the Local Government Act, 1894, provides: [His Lordship read s. 67, sub-s. 3.] As I understand ss. 62 and 67, taken together and read with other provisions of the Act to which we were referred during the argument, they mean this: that after the passing over of the powers of the adoptive Acts, under the machinery for transfer provided by the Act of 1894, the new authority is to have the same powers, duties, and liabilities as were acquired or incurred by the old authority, and I think that if it were intended to charge a different class of tax on ratepayers, or put a tax on different properties, special words would be required to carry out that intention. The Burial Acts are adoptive Acts—that is to say, they are Acts which may be adopted in their entirety by the local authority. It was contended by Mr. Marshall that s. 67 did not apply to a transfer under s. 62 because by that section a resolution to pass over the powers of the burial board to the urban district council was required, and therefore the transfer was not a transfer directly by force of the Act itself from one authority to another. I think, however, that if it had been intended to exclude from the protective clauses of s. 67 transfers which took place under s. 62, we should have found in the Act a specific description of the transfers so excluded. Sect. 67 intended, in my view, that those protective clauses should apply whenever by virtue of the operation of the Act powers

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and duties were transferred from one authority to another. In the present case it appears that money has been borrowed by the burial board under the powers given by the earlier Acts. I agree that we have not to consider the rights of the persons who lend the money, but I think that it is right to point out that the ordinary scheme of legislation is that, where the powers of a local body are transferred under an Act of Parliament, the rights, powers, and obligations transferred continue to have the same incidence and effect in the hands of the authority to whom the transfer is made as they had before it was effected. I am of opinion that this rule for a mandamus should be made absolute.

LAWRANCE J. I entirely agree.

Rule absolute.

Solicitors for overseers: *Maples, Teesdale & Co., for H. G. Roberts, Mold.*

Solicitors for urban district council: *Bower, Cotton & Bower, for Hughes & Hughes, Flint.*

W. A.

1901
May 8.

COLLINS, APPELLANT *v.* HORNSEY URBAN COUNCIL, RESPONDENTS.

Local Government — Streets — Name — Name put up by Local Authority — Removal by Owner — Towns Improvement Clauses Act, 1847 (10 & 11 *Vict. c.* 34), *s.* 64.

A landowner laid out a new street and called it by a certain name, but the local authority shortly afterwards decided that it should be known by a different name and put up that name in the street. The landowner objected and defaced the name so put up, and was convicted under s. 64 of the Towns Improvement Clauses Act, 1847, which provides that the local authority shall cause to be put up in every street "the name by which such street is to be known," and imposes a penalty upon any person who "pulls down or defaces any such name":—

Held, that the landowner had misconceived his remedy, if any, and the conviction was right.

CASE stated by the justices of Highgate.

An information was preferred, on November 30, 1900, by the Hornsey Urban Council against W. J. Collins, under s. 64 of the Towns Improvement Clauses Act, 1847 (1), for defacing the name of a street within their district.

Collins was in 1899 the owner of a building estate in the Hornsey Urban District, and early in that year submitted plans to the council, shewing the positions and names of certain proposed new streets on the estate, together with notice of his intention to lay out and construct the same. One of those new streets was named "Midhurst Avenue" on the plans. On July 10 the council gave Collins a written notice of approval of the intended works, of which notice, plans, and description

(1) 10 & 11 Vict. c. 34, s. 64: "The commissioners shall from time to time cause the houses and buildings in all or any of the streets to be marked with numbers as they think fit, and shall cause to be put up or painted on a conspicuous part of some house, building, or place at or near each end, corner, or entrance of every such street the name by which such street is to be known; and every person who destroys, pulls down, or defaces any such number or name, or puts up any number or name different from the number or name put up by the commissioners, shall be liable to a penalty not exceeding forty shillings for every such offence."

had been deposited. In July Collins submitted to the council plans and descriptions of houses to be erected in "Midhurst Avenue," which was so named in those plans, and the council on August 14 gave him written notice of approval of the intended works, "namely, building sixty-two houses in Midhurst Avenue." About September 25 Collins commenced to erect houses in this street, which had not then been formed but only marked out with stakes, and the street was subsequently formed. At the date of the information ten of the houses had been completed, and twenty-six were in course of erection.

In an agreement made in July between Collins and the council as to sewerage on the estate, this street was referred to in one clause as "Midhurst Avenue"; and in a number of written communications to Collins from the council after September 13 this street was referred to as "Midhurst Avenue," and there were the following passages referring thereto, namely, "alter the existing name," "the question of the re-naming," and "the proposed new name."

The name "Midhurst Avenue" was put up by Collins at one end of the street on a notice board. The street had not been known by any other name than that of "Midhurst Avenue" when the council proposed to name it "Collingwood Avenue"; and it had been referred to as "Midhurst Avenue" in leases and agreements of tenancy relating to houses therein.

Near to the estate of Collins there was, within the district of the council, a large house with grounds, belonging to Mr. Arnold, which was approached by an avenue of trees and was known as "Midhurst." On September 13 Arnold objected to the said street being called "Midhurst Avenue." There was no street in the district called by the name of "Midhurst" other than the street in question, and no confusion or inconvenience arose from the street being so named.

On September 24 the council wrote to Collins asking him to state what name he would "desire to substitute for 'Midhurst Avenue' in the event of the committee deciding to alter the existing name." The council subsequently suggested that the

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street should be called "Collingwood Avenue," but Collins objected. On November 5 the council resolved that it should be called "Collingwood Avenue," and informed Collins of their intention to put up that name in the street. Collins disputed the right of the council so to do, and informed them that he would at once remove the name of "Collingwood Avenue" if affixed to his property in the street. On November 27 the council affixed a board with the name "Collingwood Avenue" thereon to a house belonging to Collins at the end of the street. On the same day Collins caused the board to be painted over and the name obliterated. On December 11 all the owners of property in the street sent to the council a written objection to its being called "Collingwood Avenue" instead of "Midhurst Avenue."

The council contended that they were entitled to determine the name by which a new street in their district was to be known; that they determined that the street was to be known by the name of "Collingwood Avenue," and were therefore entitled to cause that name to be put up on Collins's house; that they never determined that this street was to be known by the name of "Midhurst Avenue"; that, if they had so determined, they were entitled to alter the name and put up another name; and that Collins was not entitled to pull down or deface the name put up by them.

Collins contended that the name of the street was "Midhurst Avenue" and not "Collingwood Avenue"; that the council had assented and determined, so far as any determination was necessary, that the name of the street should be "Midhurst Avenue"; that they had no power to alter the name of the street from "Midhurst Avenue" to "Collingwood Avenue"; that their action in putting up the board was illegal and ultra vires; and that he was therefore not guilty of any offence in defacing the name "Collingwood Avenue."

The justices were of opinion that the council had power, under s. 64 of the Act, to determine that the street should be known by the name of "Collingwood Avenue," and for that purpose to put up a board bearing that name on Collins's house; and further that, notwithstanding the fact that the

street had been named "Midhurst Avenue" by Collins as before stated, the council had power to alter that name; and that Collins was guilty of an offence under the Act in causing the name to be defaced. They accordingly convicted Collins and fined him 1*s*.

The question for the opinion of the Court was whether the justices upon the above statement of facts came to a correct determination and decision in point of law.

Naldrett, for the appellant. This street had already been named Midhurst Avenue, and the respondents had consented to and approved of that name. The local authority has no power to change the existing name of a street under s. 64 of the Towns Improvement Clauses Act, 1847, and has not that power in any other way: *Anderson* v. *Dublin Corporation*. (1) Under this Act the local authority has not that power to name new streets which exists in the metropolis under the Acts relating to the metropolis: 11 & 12 Vict. c. clxiii., s. 145; 57 & 58 Vict. c. ccxiii., ss. 32–35.

Alexander Glen, for the respondents. This was a new street, and the local authority had never determined what was the name by which it should be known until they gave it the name of Collingwood Avenue. Even if the street had already been named Midhurst Avenue, the local authority had power to change the name. It was a new street and not one which had become known by a particular name, and that fact entirely distinguishes this case from *Anderson* v. *Dublin Corporation*. (1) It is convenient and reasonable that the local authority should have the power of naming new streets, for there may often be great difficulty in ascertaining who is the private owner entitled to give a name. The local authority having put up this name in the street, acting under statutory powers, the owner of the street had no right to obliterate the name upon the ground that there was no power to put it up, but he ought to have taken legal proceedings to test the question.

Naldrett, in reply. The action of the local authority was

(1) (1885) 15 L. R. (Ir.) 410.

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illegal and in the nature of a trespass, and therefore the person aggrieved had a right to remedy the matter for himself.

LORD ALVERSTONE C.J. In my opinion, the Irish case of *Anderson* v. *Dublin Corporation* (1) is not in any way an authority upon the question which we have to decide in this case. In that case the Vice-Chancellor expressly said that he was not dealing with the case of new streets, in respect of which other and very different considerations might apply. We can easily see that in the case of altering the name of an old street great inconvenience and difficulty may be caused if an alteration of name is forced upon people; and therefore, if this case rested upon the power of the local authority to change the well-known name of an existing street, speaking for myself, though it may not be necessary to decide the point now, I think that they have not the right to do so. The language of s. 64 of the Towns Improvement Clauses Act, 1847, is very different from that of the Acts relating to London to which reference has been made, and I do not find in s. 64 any power to change the name of an old street. In the present case, however, the owner was last year minded to lay out a new street upon his estate for building purposes, and upon his plans he called that street "Midhurst Avenue." This was brought to the knowledge of the local authority, but they exercised no judgment in respect of that proposed name. The local authority then determined bonâ fide that the street should be called Collingwood Avenue, and they put up a board in the street with that name upon it. Now, considering the duty imposed upon the local authority by s. 64, and the words at the end of the section, I think that the appellant had no right to deface that name. I think that, if he has any right as owner to call this street "Midhurst Avenue," he ought to have enforced his right by taking legal proceedings against the local authority to restrain them from putting up the board with another name. I think that the statute does impose upon the local authority in the first instance the duty of putting up the

(1) 15 L. R. (Ir.) 410.

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name of a street. It imposes a penalty upon any person who pulls down or defaces the name which they have put up; and I think that it was not intended that the question whether the name was right or wrong should be decided in proceedings for a penalty for pulling down or defacing the name which the local authority has, primâ facie, lawfully put up. This was, I understand, really a new street, and I can well imagine cases arising in which, if there were several owners in a street, serious difficulty might arise as to what should be the name of the street. Although it would, I think, have been better if the matter had been made clear in this statute by words analogous to those in the Acts relating to London, I do not think that we can say that the local authority were, as a matter of law, wrong in putting up the name, and that the appellant was justified in defacing it when they had put it up. I think, therefore, that this appeal must be dismissed.

LAWRANCE J. I agree.

Appeal dismissed.

Solicitor for appellant: *A. M. M. Forbes.*
Solicitor for respondents: *L. J. Tatham.*

P. B. H.

1901
May 6.

SOUTH LONDON ELECTRIC SUPPLY CORPORATION *v.* PERRIN.

Metropolis—Nuisance—Black Smoke—Evidence—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 24 (b).

By s. 24, sub-s. (*b*), of the Public Health (London) Act, 1891, "Any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance" is a nuisance liable to be dealt with summarily under the Act.

Upon the hearing of complaints under this section it was proved that black smoke issued from a chimney several times a day during a series of days for periods varying from a few minutes to upwards of an hour.

Held, that upon these facts the magistrate was justified in finding that the smoke issued in such quantity "as to be a nuisance," although there was no evidence that any particular person or property was injuriously affected thereby.

CASE stated by a metropolitan police magistrate.

Ten several complaints under the Public Health (London) Act, 1891, were preferred by the respondent against the appellants.

The first complaint charged that at the premises occupied by the appellants the following nuisance existed after notice of the same had been duly served upon the appellants by the respondent, to wit, "a chimney (not being the chimney of a private dwelling-house) did, on November 1, 1900, send forth black smoke in such quantity as to be a nuisance," and that the appellants did unlawfully make default in complying with the requisitions of the said notice within the time specified, and that the said nuisance was caused by the act, default, or sufferance of the appellants, contrary to the provisions of the said Act.

The other nine complaints were in similar terms, except that each stated a different date, namely, November 2, November 5, November 6, November 7, November 8, November 10, November 12, November 13, and November 14, 1900, respectively. All the ten complaints were heard and determined at the same time.

At the hearing of the said complaints witnesses for the complainant proved that black smoke issued from the appellants' chimney, which is 180 feet high, on—

November	1.	From	4.32	P.M.	to	5. 5	P.M.
,,	2.	,,	3. 5	,,		3.17	,,
,,	2.	,,	4. 0	,,		4.12	,,
,,	2.	,,	4.25	,,		5.20	,,
,,	5.	,,	9.35	A.M.	to	9.47	A.M.
,,	5.	,,	9.53	,,		10.1	,,
,,	5.	,,	2.13	P.M.	to	2.44	P.M.
,,	5.	,,	3.25	,,		4.25	,,
,,	5.	,,	4.48	,,		5. 5	,,
,,	6.	,,	12.50	,,		1. 0	,,
,,	6.	,,	2.37	,,		2.55	,,
,,	6.	,,	3. 2	,,		3.10	,,
,,	6.	,,	3. 3	,,		3.39	,,
,,	6.	,,	4.24	,,		5.20	,,
,,	7.	,,	8. 5	A.M.	to	9.20	A.M.
,,	7.	,,	2.49	P.M.	to	3. 3	P.M.
,,	7.	,,	3. 9	,,		3.20	,,
,,	7.	,,	3.32	,,		3.50	,,
,,	7.	,,	3.52	,,		3.58	,,
,,	7.	,,	4.47	,,		4.53	,,
,,	8.	,,	12.45	,,		12.54	,,
,,	8.	,,	2.53	,,		3.16	,,
,,	8.	,,	3.20	,,		3.43	,,
,,	8.	,,	3.49	,,		4.22	,,
,,	8.	,,	4.25	,,		4.31	,,
,,	10.	,,	11.31	A.M.	to	11.42	A.M.
,,	10.	,,	4.15	P.M.	to	4.50	P.M.
,,	12.	,,	9.58	A.M.	to	10.8	A.M.
,,	12.	,,	3.47	P.M.	to	4. 0	P.M.
,,	12.	,,	4.28	,,		4.50	,,
,,	13.	,,	4.10	,,		4.26	,,
,,	14.	,,	3.25	,,		4.15	,,

No witness was called to prove that the black smoke was a nuisance to himself.

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On behalf of the appellants it was contended that, in the absence of affirmative evidence that a nuisance to some person or property was created by the above-mentioned black smoke, the offences charged were not made out.

On the evidence the magistrate came to the conclusion that the black smoke on each of the said days amounted to a nuisance, and he convicted and fined the appellants on each complaint.

Cripps, K.C., *Scott Fox*, K.C., and *Fleming*, for the appellants. It is not enough to shew that black smoke was emitted from a chimney 180 feet high without more. The length of the time during which the smoke was issuing did not prove its quantity. There is consequently no evidence of its being a nuisance. In *Stanley* v. *Farndale* (1), where the appellant was convicted under a by-law which provided that it should be an offence to shout in a public street to the annoyance of the residents or passengers, it was held that, in the absence of evidence that some resident or passenger was in fact annoyed other than the constable who proved the case, the conviction could not be supported. In *Stinson* v. *Browning* (2) the appellant was convicted under a section of the Highway Act which provides that it shall be an offence to make a fire near a highway to the injury of the highway, or to the injury, interruption, or personal danger of any person travelling thereon. There being no evidence of injury, interruption, or danger, the conviction was reversed.

Avory, K.C., and *Lowenthal*, for the respondent, were not called upon.

LORD ALVERSTONE C.J. I must not be understood to say that a magistrate is bound to convict merely because black smoke has been allowed to issue out of a chimney. On the other hand, in order to support a conviction, it is not necessary to shew that any particular person or property has been annoyed or injured by the smoke. Here the magistrate has found as a fact that on each of the several days mentioned in

(1) (1892) 56 J. P. 709. (2) (1866) 35 L. J. (M.C.) 152.

the complaints the smoke amounted to a nuisance. In arriving at that conclusion he was entitled to take into consideration the fact that the subject-matter of each complaint was not the issue of smoke upon an isolated occasion, but upon one of a series of days. He might, no doubt, have declined to convict in respect of those days on which the issue of smoke was the least, but he has chosen to convict in respect of all; and I think there was evidence to justify him in so doing. It is a question of fact, and with his decision we consequently cannot interfere.

LAWRANCE J. I am of the same opinion.

Appeal dismissed.

Solicitors for appellants: *Firth & Co.*
Solicitors for respondent: *Miller, Smith & Bell.*

J. F. C.

MIDLAND RAILWAY COMPANY *v.* ASSESSMENT COMMITTEE OF THE PONTEFRACT UNION AND OVERSEERS OF METHLEY.

1901 *April* 24.

Poor-rate—Assessment—Railway—Indirectly productive Portion of—Signal-box.

The signal-boxes of a railway are for purposes of parochial rating to be treated, not as part of the running line, but as part of the indirectly productive portion of the railway, and are consequently to be separately assessed in the respective parishes in which they are situate.

CASE stated by quarter sessions for the West Riding of Yorkshire upon an appeal against a poor-rate.

The Midland Railway Company, the appellants, are the owners of a railway running through the township and parish of Methley, in the Pontefract Union.

The property of the appellants in the said township consists of 3828 yards of a double line of railway, a small roadside station known as Methley Station, with the usual offices, sidings, signal-boxes, and other hereditaments, and a signal-box situate at a distance of 1320 yards south of the said station

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at a junction known as Methley Junction, where trains of the North Eastern Railway and the Lancashire and Yorkshire Railway, which said companies have running powers over the said lines of the Midland Railway, leave the said lines and proceed upon the proper lines of the said respective companies.

On April 9, 1900, the respondents, the overseers of the poor, laid a rate for the relief of the poor of the said township, whereby the appellants were assessed in respect of their property therein as follows:—

	Rateable Value. £	s.	d.
1. 3828 yards railway	5201	0	0
2. Station sidings and land . . .	117	0	0
3. Signal-boxes (Methley) . . .	1	10	0
,, ,, siding . .	2	10	0
4. Gasworks	17	0	0
5. Pumping station	36	0	0
6. Signal-box (Briggs sidings) . .	1	10	0
7. Station-house	10	0	0
8. Signal-box (Methley Junction) .	4	10	0

And a due demand for such rate was made upon the appellants.

In making the said assessment of the said 3828 yards of railway, the respondents estimated the rateable value of the line of railway within the said township by ascertaining the gross receipts of the appellants in respect of so much of the line as runs through the township, and deducting therefrom (inter alia) a sum amounting to 5½ per cent. of the said gross receipts in respect of stations and buildings (including signal-boxes) separately assessable in the several parishes in which they are respectively situate, all of which, together with all other property of the appellants within the township, were separately assessed as hereinbefore mentioned.

The appellants duly gave notice to the respondents that they objected to the said rate in respect only of the assessment upon the signal-box at Methley Junction numbered 8 on the foregoing list, and on April 11, 1900, they attended upon the assessment committee of the union of Pontefract to urge their said objection, but failed to obtain any relief in respect thereof.

They thereupon duly appealed to the court of quarter sessions for the said riding against the rate on the following grounds:—

1. That the company are by the said rate or assessment erroneously rated in respect of the signal-box at Methley Junction, which forms part of the railway in the parish or township of Methley.

2. That the company are rated in respect of the said signal-box, which is not separately rateable from the railway in the said parish or township. The said signal-box is a wooden erection 22 feet in length, 11 feet 6 inches in breadth, and 16 feet in height, and contains lower and upper floors, and is affixed to the soil by a framework consisting of six upright wooden piles 9 inches square. It contains upon the upper floor twenty-four levers for working the signals and points controlling the passing of the trains of the North Eastern and Lancashire and Yorkshire Railways respectively on, to, and off the appellants' line, together with the telegraphic and other instruments necessary thereto, and the only purposes the said erection serves are to protect the said levers and instruments, some of which are of a delicate character, from atmospheric influences, and to protect the servants of the appellants engaged in working the same from the weather. The said signal-box is only rendered necessary in its present situation by reason of the junction of the appellants' line with the lines of the other companies hereinbefore mentioned.

Upon the hearing of the appeal it was contended for the appellants that the levers within the said box are physically connected with the signals and points upon the running line, and that these signals and points cannot be worked without the instruments in the box, and that the wooden erection is essential to the proper working of the said levers and instruments; therefore the signal-box and its contents form a necessary part of the running line of railway which had already been assessed at 5201*l.*, and that if the rate appealed against in respect of the said signal-box were to stand, it would in effect be rated twice over. The levers and instruments themselves were, it was contended, clearly not rateable separately from the railway, and the wooden structure protecting them, having no

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letting value, was also not separately rateable. Reference was made to the following cases: *London and North Western Ry. Co.* v. *Llandudno Improvement Commissioners* (1); *Great Eastern Ry. Co.* v. *Fletton Overseers* (2), decided in the Queen's Bench Division on November 6, 1882; and *South Wales Ry. Co.* v. *Swansea Local Board.* (3)

On the part of the respondents it was conceded that the levers and signals within the box were not taken into account in the assessment in question, and they had included them in the assessment of 5201*l.* in respect of the railway line, the assessment in respect of the signal-box being limited to the estimated annual value of the structure alone, apart from the levers and signals. They contended that the structure was a building, and was separately rateable within the parish where it was situated, according to the parochial principle of rating, and that it was not part of the running line, but in the nature of property which was convenient, although not essential, for the proper and efficient working of the railway within the said township, and should, therefore, be separately assessed. It was further contended that, not being directly productive of profit to the appellants any more than station buildings and other conveniences provided by them, all of which were maintained out of the gross receipts of the appellants from the line, a deduction was made from the gross receipts in respect of these non-directly productive properties before fixing the net rateable value of the running line, the deduction being 5½ per cent. on the gross receipts; that that was a fair and reasonable deduction, and if it were held that the appellants, having had the benefit thereof, were also to escape from a separate assessment of the signal-box, the result would be a loss to the parish of the benefit of the hereditaments.

The quarter sessions dismissed the appeal, subject to a case for the opinion of the Court.

Compston (*Balfour Browne, K.C.*, with him), for the appellants. The line could not be worked without the signals and levers:

(1) [1897] 1 Q. B. 287. (2) Browne on Rating, 2nd ed. p. 631.
(3) (1854) 4 E. & B. 189.

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therefore they are part of the running line; and this much is admitted by the respondents, who have not rated them separately. But except as a cover to the levers, the signal-box would serve no object, and, therefore, it also must be regarded as part of the line. A signal-box would have no letting value for any other purpose; it would be of no use at all if the instruments were not there. The case of *London and North Western Ry. Co.* v. *Llandudno Improvement Commissioners* (1) supports the appellants' contention. It was there held that the roof covering the platforms at a railway station was "land used only as a railway" within the meaning of a local improvement Act, which provided that land of that description should be rated to the improvement rate at one-fourth part only of its annual value.

Macmorran, K.C., and *Scholefield*, for the respondents, were not called upon.

LORD ALVERSTONE C.J. This case is really unarguable. The confusion has arisen from attempting to apply to the question before the Court a decision which was given upon a wholly different matter. We are not here considering whether a signal-box is part of the land used for the purposes of a railway so as to entitle it, under the provisions of some special Act, to be rated for certain purposes upon only a proportional part of its value instead of upon its full value. It may well be that for such purposes signal-boxes, and many other things of the same class which form part of the railway stations, would be properly included in land used as a railway. But that is not the question here. The question which we have to determine is whether, for the purposes of parochial rating, a signal-box is to be treated as part of the running line, the directly productive portion of the railway which is assessed upon its net earnings, or whether it is to be treated as part of the indirectly productive portion, and to be, therefore, separately assessed upon its structural cost. Railways are not in general assessed upon the ordinary principles upon which other classes of real property, such as houses, are assessed. In the case of railways,

(1) [1897] 1 Q. B. 287.

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you start by ascertaining the gross earnings of the railway, and from those gross earnings, in order to arrive at the rent which a tenant from year to year would give for the railway, you make deductions, and among others a deduction in respect of stations and other indirectly productive portions of the railway; and those indirectly productive portions are separately assessed in the parishes in which they are respectively situate. The deduction which is so made from the gross earnings in respect of the indirectly productive portions for the purpose of arriving at the net earnings or hypothetical tenant's rent is now treated in practice as 5½ per cent. of the gross earnings. It is contended on behalf of the appellants that because a railway cannot be worked without signals, therefore a signal-box is to be treated as part of the running line; and therefore that it is to be assumed that the overseers have already taken its value into consideration in arriving at the net earnings of the railway. But that contention cannot be supported. The case states that in ascertaining the value of the line in the township a deduction has been made in respect of the rateable hereditaments separately assessed, including signal-boxes. There is no distinction between signal-boxes and any other indirectly productive portions of the railway, such as water tanks, turntables, or the like, which are liable to be separately rated in the particular parishes in which they are situated. In my opinion, the quarter sessions acted upon a well-settled and defined principle of law. If we were to hold the sessions to be wrong, we should not only be disturbing the practice of railway rating which has been in force for many years, but we should in effect be allowing a deduction twice over. The decision of the quarter sessions must be affirmed.

LAWRANCE J. I agree.

Appeal dismissed.

Solicitors for appellants: *Beale & Co.*
Solicitors for respondents: *Blundell, Gordon & Co.*

J. F. C.

WILLIS *v.* LOVICK.

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County Court—Statutory Defence—Notice—Gaming and Wagering Contract—County Court Rules, 1889, *Order x., rr.* 10, 18*a*—*Gaming Act*, 1892 (55 & 56 *Vict. c.* 9), *s.* 1.

In an action in the county court for commission, the defence that the promise to pay commission was null and void under s. 1 of the Gaming Act, 1892, as being made in respect of a gaming and wagering contract, is a statutory defence of which notice must be given under Order x., rr. 10 and 18*a*, of the County Court Rules, 1889.

APPEAL from a decision of the judge of the Westminster County Court.

The action was brought to recover commission. The particulars of claim were: "To 25 per cent. commission on cash received by the defendant on the introduction of plaintiff, and on which commission was agreed to be paid." The plaintiff claimed 8*l.* 15*s.* 10*d.* as the balance of commission due to him, and alternatively claimed that sum for money had and received by the defendant for the use of the plaintiff.

At the trial in the county court it appeared that the plaintiff was employed by the defendant, a turf commission agent, as confidential clerk, on the terms that the plaintiff was to be paid commission in lieu of salary on sums received by the defendant from persons introduced to him by the plaintiff, and for whom the defendant made bets on horse-races.

The only defence set up was that the agreement to pay commission was void under s. 1 of the Gaming Act, 1892 (1), being a promise to pay a sum of money by way of commission in respect of a gaming and wagering contract rendered null and void by 8 & 9 Vict. c. 109. (2)

(1) 55 & 56 Vict. c. 9, s. 1: "Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act, 8 & 9 Vict. c. 109, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money."

(2) The Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18, provides that "all contracts, whether by parol or in writing, by way of gaming or wagering, shall be null and void."

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The defendant had given no notice of any statutory defence to the claim. (1)

The county court judge held that the defence set up was a statutory defence of which notice ought to have been given under the County Court Rules. He refused to adjourn the hearing of the case, and gave judgment for the plaintiff for the amount claimed.

The defendant appealed.

C. S. Magee, for the defendant. The defence set up is not a statutory defence within Order x., rr. 10 and 18*a*, of the County Court Rules, 1889. Where the contract sued upon is rendered void ab initio, the plaintiff cannot make out a case, and the defendant has nothing to answer. The cases in which defences have been held to be statutory defences of which notice must be given were decided on statutes which impose a limit on the right of a plaintiff to enforce a contract by special conditions either precedent or subsequent—i.e., they are leges fori as opposed to leges contractus. Those cases are: *Denny* v. *Bennett* (2), *Conroy* v. *Peacock* (3), *Lewis* v. *Burrell* (4), and *Brutton* v. *Branson*. (5) Under one of the Truck Acts—37 & 38 Vict. c. 48, s. 2—certain contracts to stop wages are declared to be "illegal, null and void." By s. 3 a penalty is imposed on employers who bargain to deduct from wages any part of those wages for certain charges; and by s. 5 no action shall be allowed for any deduction or stoppage of wages. It would follow, if the construction of the County Court Rules be not limited in the way suggested, that, where notice of a defence under the statute was not given, a contract made

(1) By the County Court Rules, 1889, Order x., r. 10, "Where the defendant intends to rely upon any of the grounds of defence mentioned in rules . . . . 18 of this order . . . . he shall file a notice stating thereon his name and address, together with a concise statement of such grounds, five clear days before the return day; . . . ."

Rule 18*a*: "When in any action the defendant relies upon any statutory defence, or any defence of which he is required by any statute to give notice, he shall in his statement set forth the year, chapter, and section of the statute, or the short title thereof, and the particular matter upon which he relies."

(2) (1896) 44 W. R. 333.

(3) [1897] 2 Q. B. 6.

(4) (1898) 77 L. T. 626.

(5) [1898] 2 Q. B. 219.

illegal and void by the Act might be enforced in the county court although a fine is imposed for making it. The result would be to leave it to the discretion of the county court judge whether, by granting or refusing an adjournment in order to let the statute be pleaded, he allowed the contract to be enforced or not.

Next, the question raised under the Gaming Act, 1892, in the present case is not properly matter of defence at all, because it could before the Judicature Acts have been raised under plea of the general issue. That point was taken in argument in *Brutton* v. *Branson* (1)—a decision upon the question whether a defence under the Statute of Frauds was a statutory defence. The answer given by Wills J. to the point does not apply to the Act of 1892.

Order XIX., r. 15, of the Rules of the High Court is an analogous rule; and in *Scott* v. *Brown, Doering, McNab & Co.* (2) the Court held that a contract which was illegal, because fraudulent, could not be enforced by the plaintiff. The illegality had not been pleaded. The present case is still stronger, because the contract is rendered void ab initio by statute.

Wildey Wright (*H. Leigh Ormsby* with him), for the plaintiff, was not called upon to argue.

LORD ALVERSTONE C.J. In this case the county court judge has decided that a defence which arises under the Gaming Act, 1892, is a statutory defence of which notice ought to be given under the County Court Rules. We have to deal with Order X., rr. 10 and 18*a*, of the County Court Rules of 1889, which say that where the defendant intends to rely upon any statutory defence he must give notice of it, as specified in the rules. Looking at the particulars of claim in the action, it might be maintained without any question under the Gaming Act of 1892 being raised; and since that Act was passed it has been decided that, notwithstanding the Act, a principal can recover from his agent money which has been received by the latter for bets made for his principal. It was unknown until the action

(1) [1898] 2 Q. B. 219. (2) [1892] 2 Q. B. 724.

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came on for trial that it involved an allegation that the promise to pay commission was in respect of a gaming contract. Now, I do not propose to lay down a rule which shall exactly define what is a statutory defence, or embrace all statutory defences. I agree with Wills J. in his judgment in *Brutton* v. *Branson* (1), and I think it is ground upon which we may fairly go, that the words "statutory defence" are not words of art. That decision was with respect to a defence raised under the Statute of Frauds, and my brother Wills pointed out that the non-existence of a writing to satisfy that statute had always been treated by lawyers as a matter of defence. That, said Mr. Magee, does not apply to the Gaming Act, 1892. But I may remind him that, so long ago as the year 1838, the defence that the money sued for was received in respect of an illegal wager was held to be a defence which must be specially pleaded. (2) I think that the county court judge came to a right conclusion in the case before us, because neither the Court nor the plaintiff could know until the trial that this defence was to be raised. As to the High Court rule, the language is very different, and I do not think that the case cited—*Scott* v. *Brown, Doering, McNab & Co.* (3)—has any application. The judges of the Court of Appeal thought fit to deal with the question of law which was before them; but no rule has been laid down that a judge ought to do otherwise than was done here, in a proper case, where no notice of the defence has been given, and where he holds, as he held here, rightly in my opinion, that the defence raised is a statutory defence. I think we should be interfering with a useful rule if we held that he ought to have done otherwise. I am of opinion that this appeal should be dismissed.

LAWRANCE J. I am of the same opinion.

Appeal dismissed.

Solicitor for plaintiff: *J. F. Bonney.*

Solicitor for defendant: *H. A. Grey.*

(1) [1898] 2 Q. B. 219.

(2) See *Martin* v. *Smith*, (1838) 4 Bing. N. C. 436; 6 Dowl. 639.

(3) [1892] 2 Q. B. 724.

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[IN THE COURT OF APPEAL.]

C. A.
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May 3.

SPENCE *v.* COLEMAN.
THE INSPECTOR-GENERAL IN COMPANIES LIQUIDATION, GARNISHEE.

Practice—Attachment of Debts—Garnishee Order—Money under Control of Public Official—Inspector-General in Companies Liquidation—Share of Surplus Assets of Company in Liquidation—"Companies Liquidation Account"—Rules of Supreme Court, Order XLV., *r.* 1—*Companies (Winding-up) Act*, 1890 (53 *&* 54 *Vict. c.* 63), *ss.* 11, 15.

The proportion of the surplus assets of a company in liquidation belonging to a shareholder who could not be found was, in compliance with sub-s. 3 of s. 15 of the Companies (Winding-up) Act, 1890, paid by the liquidator to the "Companies Liquidation Account" with the Bank of England:—

Held, that the sum so paid in was not a "debt" due to the shareholder, and that it could not be attached by his judgment creditor by means of a garnishee order under Order XLV., r. 1, of the Rules of the Supreme Court.

Decision of Day J. reversed.

APPEAL by the Inspector-General in Companies Liquidation against an order of Day J., affirming the order of the master making absolute a garnishee order nisi against the appellant.

Spence had on February 18, 1901, recovered judgment for 1829*l.* 18*s.* 9*d.* against Coleman. Coleman was a shareholder in a company called the Bluebell Proprietary Company, Limited. This company was wound up voluntarily, and, after the liquidator had realized the assets and paid the debts of the company, there remained in his hands a surplus for distribution among the shareholders. The sum payable to Coleman amounted to 116*l.* 19*s.* 5*d.* The liquidator sent the usual notices to Coleman at his registered address, informing him of the amount payable to him, but the notices were all returned through the post marked "unknown." Under these circumstances the liquidator, in compliance with s. 15, sub-s. 3, of the Companies (Winding-up) Act, 1890, paid the 116*l.* 19*s.* 5*d.* to the "Companies Liquidation Account" at the Bank of England, and thus obtained an effectual discharge in respect of the sum

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so paid in. The garnishee order absolute ordered "that the said garnishee do forthwith pay to the said judgment creditor the debt due from him to the said judgment debtor (or so much thereof as may be sufficient to satisfy the judgment debt), and that in default thereof execution may issue for the same."

Sir R. B. Finlay, A.-G., Muir Mackenzie, and *R. J. Parker,* for the Inspector-General. A garnishee order can be made only when there is a debt due from the garnishee to the judgment debtor: Order XLV., r. 1. (1) Here no debt is due

(1) By Order XLV., r. 1, "The Court or a judge may, upon the ex parte application of any person who has obtained a judgment or order for the recovery or payment of money, either before or after any oral examination of the debtor liable under such judgment or order, and upon affidavit by himself or his solicitor stating that judgment has been recovered, or the order made, and that it is still unsatisfied, and to what amount, and that any other person is indebted to such debtor, and is within the jurisdiction, order that all debts owing or accruing from such third person (hereinafter called the garnishee) to such debtor shall be attached to answer the judgment or order, and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Court or a judge or an officer of the Court, as such Court or judge shall appoint, to shew cause why he should not pay to the person who has obtained such judgment or order the debt due from him to such debtor, or so much thereof as may be sufficient to satisfy the judgment or order."

By the Companies (Winding-up) Act, 1890, s. 11, "(1.) An account, called the Companies Liquidation Account, shall be kept by the Board of Trade with the Bank of England, and all moneys received by the Board of Trade in respect of proceedings under this Act shall be paid to that account.

"(2.) Every liquidator of a company which is being wound up by order of the Court shall, in such manner and at such times as the Board of Trade, with the concurrence of the Treasury, direct, pay the money received by him to the Companies Liquidation Account at the Bank of England, and the Board of Trade shall furnish him with a certificate of receipt of the money so paid."

By s. 15, "(1.) If the winding-up of a company is not concluded within one year after its commencement, the liquidator of the company shall, at such intervals as may be prescribed, until the winding-up is concluded, send to the Registrar of Joint Stock Companies a statement in the prescribed form and containing the prescribed particulars with respect to the proceedings in and position of the liquidation."

"(3.) If it appears from any such statement or otherwise that any liquidator of a company has in his hands or under his control any money representing unclaimed or undistributed assets of the company which have remained unclaimed or undistributed for six months after the date of their

from the Inspector-General or from any official of the Board of Trade to the judgment debtor; the relation of debtor and

receipt, the liquidator shall forthwith pay the same to the Companies Liquidation Account at the Bank of England. Every such liquidator shall be entitled to the prescribed certificate of receipt for the moneys so paid, and that certificate shall be an effectual discharge to him in respect thereof."

"(5.) Any person claiming to be entitled to any money paid into the Bank of England in pursuance of this section may apply to the Board of Trade for payment of the same, and the Board of Trade may, on a certificate by the liquidator that the person claiming is entitled, make an order for the payment to that person of the sum due. Any person dissatisfied with the decision of the Board of Trade in respect of any claim made in pursuance of this section may appeal to the High Court."

By the Companies (Winding-up) Rules, 1890, rule 131, "Any liquidator whose duty it is under s. 15 of the Companies (Winding-up) Act, 1890, to pay into the Companies Liquidation Account at the Bank of England, any money representing unclaimed or undistributed assets of the company, shall apply in such manner as the Board of Trade may direct to the Board of Trade for a paying-in order, which paying-in order shall be an authority to the Bank of England to receive the payment."

Rule 132: "An application by a person claiming to be entitled to any money paid into the Bank of England in pursuance of s. 15 of the Companies (Winding-up) Act, 1890, shall be made in such form and manner as the Board of Trade may from time to time direct, and shall, unless the Board of Trade otherwise directs, be accompanied by the certificate of the liquidator that the person claiming is entitled, and such further evidence as the Board of Trade may direct."

Rule 132A: "Where the liquidator requires to make payments out of money paid into the Bank of England in pursuance of s. 15 of the Companies (Winding-up) Act, 1890, either by way of distribution or in respect of the costs and expenses of the proceedings, he shall apply in such form and manner as the Board of Trade may direct, and the Board of Trade may thereupon either make an order for the payment out to him of the sum required to make such payments, or may direct cheques to be issued to him for transmission to the persons to whom the payments are to be made."

Rule 133: "(1.) For the purposes of sub-s. 3 of s. 15 of the Companies (Winding-up) Act, 1890, money at the credit of the account of the official liquidator of any company with the Bank of England shall be deemed to be money under the control of the official liquidator, and when such money has remained unclaimed or undistributed for six months after the date of receipt it shall be transferred to the Companies Liquidation Account, and the official liquidator and chief clerk of the Chancery Division of the High Court shall draw and sign such cheques or orders as may be necessary for the transfer of the money.

"(2.) Any application to the Board of Trade for payment out of moneys so transferred shall be signed by the liquidator and countersigned by the chief clerk of the judge of the Chancery Division to whom the winding-up is assigned."

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creditor does not exist between them. And by s. 15, sub-s. 3, of the Companies (Winding-up) Act, 1890, the liquidator is discharged by the payment of the money to the Companies Liquidation Account. When the money has been paid in it is subject to the directions of the Board of Trade, and the Inspector-General has no control over it. A claim to it can be enforced only in the mode prescribed by s. 15, sub-s. 5. A garnishee order cannot be made to attach money in the custody of the official receiver as trustee in bankruptcy: *Prout* v. *Gregory* (1); or in the hands of the registrar of a county court: *Dolphin* v. *Layton*. (2) An officer of the Board of Trade stands in a similar position. *Ex parte Turner* (3) may be relied on by the respondent; but there a garnishee order had been made attaching moneys in the hands of a company, and it had not been appealed from, and effect was given to it in the winding-up of the company. No garnishee order was made against the official manager or any other official. That case was explained by Bovill C.J. in *Hunter* v. *Greensill*. (4) In *Klauber* v. *Weill* (5) no appeal was brought against the garnishee order.

It has been decided that s. 15 applies to a company in voluntary liquidation: *In re Stock and Share, &c., Co.* (6)

Rufus Isaacs, K.C., and *McIntyre*, for the judgment creditor. It is admitted that this money has been paid to the Companies Liquidation Account, and that it belongs to Coleman. It is not part of an undistributed fund. It has been paid to the account only because Coleman has not claimed it and cannot be found. The Inspector-General, or whatever officer of the Board of Trade has control of the account, is not an officer of the Court, and this distinguishes the present case from *Prout* v. *Gregory* (1), *Hunter* v. *Greensill* (7), and *Dolphin* v. *Layton*. (2) The Court can summarily order its own officer to pay money under his control; it cannot make such an order upon an official of the Board of Trade. The judgment creditor

(1) (1889) 24 Q. B. D. 281.
(2) (1879) 4 C. P. D. 130.
(3) (1860) 2 D. F. & J. 354.
(4) (1872) L. R. 8 C. P. 24, at p. 27.
(5) (1901) 17 Times L. R. 344.
(6) [1894] 1 Ch. 736.
(7) L. R. 8 C. P. 24.

could not make an application under s. 15, sub-s. 5, until he had obtained a garnishee order; he could not without that shew that he was entitled to the money. The liquidator could not certify that he was entitled, not having any materials to enable him to do so. If the judgment creditor cannot obtain a garnishee order, he cannot in any way reach this fund, which, it is admitted, belongs to the judgment debtor. Sub-s. 5 only says that the Board of Trade *may* make an order for payment to a claimant; it does not say that a claimant shall not avail himself of any other mode of obtaining payment. Execution would not issue against the Inspector-General unless he has the money and does not pay it. *Ex parte Turner* (1) is really in point. Something more than a question of priorities was decided there, as the head-note shews. In *Mack* v. *Ward* (2) the point now raised was not really decided. It is only a decision that the liquidator in a voluntary winding-up "is not bound to a particular shareholder" as to the distribution of the company's assets. At any rate, that decision does not bind this Court. In the present case the fund in question is no longer part of the assets of the company. It was paid into the Bank only because Coleman could not be found.

[COLLINS L.J. It was not paid in earmarked as the money of Coleman.

Sir R. B. Finlay, *A.-G.*, for the Inspector-General. The account is a general one, to which payments are made on account of various companies in liquidation.]

If the liquidator had paid the money into a bank to be held on behalf of Coleman the judgment creditor could have obtained a garnishee order against the bank. The position of the Inspector-General does not differ from that of the bank in such a case. The liquidator being discharged by the payment into the Bank of England, the money cannot be obtained from him; the only way of getting it is from the Liquidation Account.

[COLLINS L.J. Has *Ex parte Turner* (1) ever been followed?]

Apparently not. It was referred to in two Irish cases:

(1) 2 D. F. & J. 354. (2) W. N. (1884) 16.

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Dawson v. *Malley* (1); *In re Dublin Cattle Market Co.* (2) In the former case it was held that money in the hands of an officer of the Court could not be attached.

COLLINS L.J., after stating the facts and referring to sub-s. 3 of s. 15 of the Act of 1890, continued:—On behalf of the appellant the objection is taken that this particular fund to which Coleman, the judgment debtor, is entitled is not one which can be made the subject of attachment under the provisions contained in Order XLV., r. 1, of the Rules of the Supreme Court. [The Lord Justice read rule 1.] Therefore in limine this point arises: Is or was the Inspector-General in Companies Liquidation a debtor to Coleman? A subsidiary point was taken, namely, that in no event could the Inspector-General be a debtor to Coleman, even if some other official of the Board is; but the Attorney-General does not rely upon any technicality of that kind. He says, "You cannot point to any person who is a debtor to Coleman in respect of this fund." He does not take the point that the creditor has not selected the right official, but he is willing to assume that the creditor has named the official who most nearly fills the character of a debtor to Coleman.

The first thing the judgment creditor has to establish is, that there is a debt due from the garnishee to the judgment debtor. And, even if he succeeds in establishing that, he is met by another difficulty, namely, whether the proper way of recovering the debt would not be by means of the special mode provided in sub-s. 5 of s. 15 of the Act of 1890, and whether, that special provision having been made, there is any other remedy. But the two contentions run together, inasmuch as they both tend to shew that there is no debt.

Is there then any debt due from any person who can be named to the judgment debtor as the result of the payment made by the liquidator into the general account called the "Companies Liquidation Account" at the Bank of England? I am clearly of opinion that there is not.

A number of cases have been cited, but I need not go

(1) (1867) Ir. Rep. 1 C. L. 207. (2) (1867) Ir. Rep. 1 Eq. 153.

through them in detail. The effect of them is, that when it is the duty of some officer of the Court to distribute money which is in his hands in a particular way the relation of debtor and creditor is not constituted between him and the person who is entitled to all or some part of the money which is in his hands. He is an officer of the Court and his duty is to the Court, and no debt is created which can be the subject-matter of attachment against him as garnishee. That is the principle of those cases, and it has been applied to liquidators, trustees in bankruptcy, and the registrar of a county court. Mr. Rufus Isaacs, while fully admitting that principle, contends that it has no application to the particular official in whose custody is this sum of money to which Coleman, the judgment debtor, is entitled. In my opinion that argument is not well founded. The proceedings in the liquidation of companies are regulated by statute, and when money has been paid in by the liquidator under clause 3 of s. 15, sub-s. 5 goes on to provide how it is to be got out—how payment is to be obtained by a person who can shew that it or some aliquot part of it is payable to him. [The Lord Justice read sub-s. 5, and continued:—]

Now, for this purpose the person (I will assume it is the Inspector-General) who has the custody of this particular sum of money is simply an officer of the Board of Trade. He can do nothing with it except under their order made on an application in the manner pointed out in sub-s. 5. He is in the same category as an officer of the Court, as the registrar of a county court, or a trustee in bankruptcy. Every principle which has been laid down as regards those officials applies equally to him. As between him and the judgment debtor there is only an obligation on his part, if and when he is ordered by the Board of Trade so to do, to hand over the money to the person to whom the Board of Trade directs him to hand it. That being so, it is clear, I think, that there was no debt due to the judgment debtor. In my opinion, sub-ss. 3 and 5 taken together negative the notion of a debt.

But, even if there were a debt (which I am clearly of opinion there is not), there is, I think, one method of recovering it and one only, and that is not by means of garnishee proceedings.

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Collins L.J.

Mr. Rufus Isaacs points out that a judgment creditor of the person who is entitled to the money can under no circumstances avail himself of that particular method of recovering it, because sub-s. 5 says that "the Board of Trade may, on a certificate by the liquidator that the person claiming is entitled, make an order for the payment to that person of the sum due." It is said that the liquidator has not the materials for certifying that the judgment creditor is the person entitled to the money, and therefore sub-s. 5 cannot apply to him and he is not bound by it; and, consequently, it is not an answer to his application for a garnishee order. That argument, as it seems to me, cuts both ways. It may be that this particular mode of recovering money in a winding-up was not given or intended to meet the case of a judgment creditor who has obtained a garnishee order. It applies to matters wholly outside the garnishee procedure. Whether the judgment creditor can reach the fund in some other way it is not for us now to decide. It is sufficient to say that, taking the whole of s. 15 together, there is no debt due to the judgment debtor. A particular mode of recovering certain sums of money is provided, and that mode has not been resorted to in this case. It is of no avail to prove that there is a debt, if there is a statutory mode of recovering it and no other. In my opinion, therefore, this appeal ought to be allowed and the order discharged.

STIRLING L.J. I am of the same opinion. The point is a short one, namely, that in order that Order XLV., r. 1, may apply it is necessary that the relation of debtor and creditor should be proved to exist between the judgment debtor and a third person.

Now the fund which it is sought to attach is a sum of money which constitutes part of the surplus assets of a company in liquidation. The company's assets were more than sufficient for the payment of their debts, and therefore the surplus became distributable amongst the shareholders. One of the shareholders was the judgment debtor Coleman, and the liquidator in due course gave him notice that this sum of money was payable to him. He paid no attention to the

notice, and, under the provisions of s. 15, sub-s. 3, of the Companies (Winding-up) Act, 1890, this sum due to him was paid by the liquidator to the Companies Liquidation Account at the Bank of England. This, as I understand, is a general account kept in pursuance of the Act at the Bank of England, and it relates to all companies which are in liquidation. I may refer to ss. 11, 15, and 16 of the Act, which seem to me to shew clearly that the Board of Trade are to have the control over this account, and that is further borne out by the Companies (Winding-up) Rules made under the Act: see rules 80, 132, 133. Any person who has a claim against that account may under sub-s. 5 of s. 15 apply to the Board of Trade for payment, and the Board may, on a certificate by the liquidator that the person claiming is entitled, make an order for the payment to the applicant of the sum due to him; and if any person is dissatisfied with the decision of the Board of Trade (this shews that the Board of Trade is to act judicially) he may appeal to the High Court. That is the mode in which the fund is to be dealt with. It is admitted that there can now be no claim against the liquidator; he is discharged by sub-s. 3 of s. 15, and it seems to me that the only proceeding open to obtain payment of the money is that provided by sub-s. 5. I come, therefore, to the conclusion that there is no debt due, either from the Board of Trade or from any of their officials, to the judgment debtor, and that Order XLV. does not apply.

I desire to add a word as to the case which has been so much relied upon: *Ex parte Turner*. (1) There an application was made to Willes J. in chambers for a garnishee order. A company was indebted to the judgment debtor, and, notwithstanding that the company was in liquidation, Willes J., finding that a debt was due from it to the judgment debtor, made an order attaching the debt so due in the hands of the company, the judgment creditor undertaking not to act on the order except under the order of the Court of Chancery. The order was made, as appears from the report, against the company, not against the liquidator, and still less against any official of the Board of Trade. The order which has been made

(1) 2 D. F. & J. 354.

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Stirling L.J.

in the present case is in a totally different form from that which was the foundation of the application to the Court of Chancery in *Ex parte Turner*. (1) The order in that case was made in the proper form, and the Court gave effect to it in the winding-up. That is all which that case decides. But here we have not arrived at that point, because no proper order attaching a debt has yet been made, and I doubt if such an order can be made against any one. However much we may regret that the forms of the Court do not permit that every portion of the property of a judgment debtor shall be made available for the payment of his just debts, we are not at liberty to depart from the rules which have been laid down. In my opinion, therefore, the appeal should be allowed.

COLLINS L.J. I should have added that in the recent case in the other branch of this Court—*Klauber* v. *Weill* (2)—the argument was based on the fact that there was in existence a garnishee order which had not been appealed from, and upon that fact alone. Therefore, that case has no application here.

Appeal allowed.

Solicitors: *Solicitor to the Board of Trade; Bird, Moore & Strode.*

(1) 2 D. F. & J. 354.

(2) 17 Times L. R. 344.

W. L. C.

FULLERS, LIMITED *v.* SQUIRE.

1901
May 14.

Factory—Workshop—"Adapting for Sale"—Factory and Workshop Act, 1878 (41 & 42 *Vict. c.* 16), *s.* 93.

Premises which were used in the daytime as a shop for the sale of sweetmeats by retail were used at night after shop hours for the purpose of packing the sweetmeats into the ornamental boxes in which they were sold :—

Held, that on those facts there was evidence to justify the finding that the premises were a "workshop" within the meaning of the Factory and Workshop Act, 1878.

CASE stated by a metropolitan police magistrate.

By s. 93 of the Factory and Workshop Act, 1878, the expression "workshop" means (inter alia) "any premises, room or place not being a factory within the meaning of this Act, in which premises, room or place, or within the close or curtilage or precincts of which premises, any manual labour is exercised by way of trade or for purposes of gain in or incidental to the following purposes or any of them—that is to say,

"(*a*) in or incidental to the making of any article or of part of any article, or

"(*b*) in or incidental to the altering, repairing, ornamenting, or finishing of any article, or

"(*c*) in or incidental to the adapting for sale of any article, and to which or over which premises, room or place the employer of the persons working therein has the right of access or control."

The appellants are a firm of manufacturers and retail vendors of bonbons, sweetmeats, and confectionery, carrying on a wholesale business at a factory at Hammersmith, and have amongst other retail places of business a retail shop at 206, Regent Street.

At 206, Regent Street the appellants carry on their business on the ground, first, and top floors. On the top floor artificial flowers are sewn on to the wicker hampers hereinafter mentioned. This floor is separate from the ground and first floors,

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and was separately managed and regulated by the appellants according to the provisions of the Factory and Workshop Acts, 1878 to 1895. The ground and first floors were used for the sale of bonbons, sweetmeats, wicker hampers packed and decorated as hereinafter set out, cardboard boxes, and confectionery, and also as tea-rooms and in the manner hereinafter described.

One Ada Simmonds was on December 19 and 20, 1900, in the employment of the appellants, and was employed by them at their premises at Hammersmith from 8 A.M. until noon on December 19, and afterwards on the ground and first floors at 206, Regent Street (with certain intervals), from 1 P.M. on December 19 to 3 A.M. on December 20.

For the purposes of the last-mentioned employment Ada Simmonds was furnished by the appellants with an assortment of bonbons and sweetmeats of various sizes and colours, also with cardboard boxes, ornamental wicker hampers, ribbons of various sizes and colours, and fancy lace paper necessary for her work hereinafter described.

From 1 P.M. on December 19 until 3 A.M. on December 20 Ada Simmonds was chiefly engaged in packing and arranging in layers in the cardboard boxes and ornamental hampers an assortment of bonbons and sweetmeats of different colours, shapes, and sizes, in fancy patterns, placing sheets of lace paper between each layer of sweetmeats or bonbons, tying up the hampers and boxes when so filled with the fancy ribbons, and in arranging them with bows on the outside of the boxes and hampers with a view to rendering them more attractive to purchasers than they would be if not so tastefully arranged, sorted and packed and bound up; and the magistrate found as a fact that they were so rendered more attractive by the work so expended upon them, and that the work was work requiring skill and taste on the part of Ada Simmonds.

The hampers when so filled, arranged, and dealt with as aforesaid were intended to be sold and were sold to customers as a whole and at a certain fixed price for the whole; but the price was the same as that charged to customers for the ornamental hampers when empty plus the price of the sweets,

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no special or separate charges being added in respect of the packing.

The appellants were summoned upon an information charging that they, being the occupiers of a workshop within the meaning of the Factory and Workshop Acts, 1878 to 1895, at 206, Regent Street, did there unlawfully employ Ada Simmonds after the legal period of employment contrary to the said statutes.

The magistrate convicted the appellants subject to a case for the opinion of the Court.

Joseph Walton, K.C., and *Giveen*, for the appellants. There was no evidence on which the magistrate could find that the place where the woman was employed was a workshop within the meaning of s. 93. He went upon the ground that the process of packing the sweetmeats into the boxes was an "adapting for sale" within the section. If that view is right, every grocer's or druggist's shop in which the articles sold are done up in parcels would be a workshop. The section was intended to deal with a manufacturing process, which the mere preparation for delivery to the customer is not. The packing of the sweetmeats into boxes was not an adapting for sale, but part of the process of sale itself.

H. Sutton, for the respondent, was not called upon.

LORD ALVERSTONE C.J. This case is very near the line. The facts appear to be that the place at which this work of packing sweetmeats was being carried on was for a great part of the day used as an ordinary shop in which sweetmeats and other articles were sold by retail, but up to a very late hour of the night, long after the ordinary shop hours had ceased, it was used for this particular work of packing. I do not wish to express any opinion as to whether similar work would, if carried on in an ordinary shop during shop hours, come within the section. The only question we have to decide is whether there was evidence on which the magistrate could come to the conclusion that he did. I think there was. What was being prepared for sale was boxes of sweetmeats, and the operation of putting the sweetmeats in layers with ornamental papers

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between them and ornamenting the boxes afterwards was an adapting of them for sale within the meaning of the section. If the operation in question had taken place in a room in a factory, or in a building in which sweetmeats were sold wholesale, I should have entertained no doubt about the matter. And although the place here was an ordinary shop in which these articles were sold by retail, I think that, having regard to the fact of the operations being carried on long after shop hours, the magistrate was justified in thinking that the operation was not a mere incident of the ordinary business of the shop, but was an adapting of the articles for sale. The appeal must be dismissed.

LAWRANCE J. I agree.

Appeal dismissed.

Solicitors for appellants: *Beaumont & Son.*
Solicitors for respondent: *Solicitor to the Treasury.*

J. F. C.

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May 8.

PICKFORD, APPELLANT *v.* CORSI, RESPONDENT.

Pawnbroker—Illegal Pawn of Chattel—Pawner convicted of stealing the Chattel—Subsequent Prosecution by Pawnbroker for illegal Pawning—Pawnbrokers Act, 1872 (35 & 36 *Vict.* c. 93), s. 33.

The conviction of a person for larceny of a chattel is no bar to his subsequent prosecution, under s. 33 of the Pawnbrokers Act, 1872, for illegally pawning the chattel which he had stolen.

CASE stated by a metropolitan police magistrate.

An information was preferred by Pickford against Corsi, on January 18, 1901, under s. 33 of the Pawnbrokers Act, 1872 (1), charging that Corsi had knowingly and designedly pawned

(1) 35 & 36 Vict. c. 93, s. 33: "If any person knowingly and designedly pawns with a pawnbroker anything being the property of another person, the pawner not being employed or authorized by the owner thereof to pawn the same, he shall be guilty of an offence against this Act, and shall be liable, on conviction thereof in a court of summary jurisdiction, to forfeit any sum not exceeding 5*l.*, and in addition thereto, any sum not exceeding the full value of the pledge as ascertained by the Court.

"The forfeitures when recovered shall be applied towards making satisfaction thereout to the party injured, and defraying the costs of prosecution,

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with Pickford, a pawnbroker, two rings belonging to one C. L. Biddulph, he (Corsi) not being employed or authorized by Biddulph to pawn the same.

On January 5, 1901, Corsi pawned with Pickford, who was a pawnbroker, two rings for 6*l*. The rings had been stolen by Corsi, and were the property of Biddulph. On January 16, 1901, Biddulph charged Corsi with stealing the two rings on a day prior to January 5, 1901, and he was convicted at the police court, and bound over to come up for judgment if called upon. On the same day Biddulph issued against Pickford a summons, under s. 27 of the Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), for unlawfully refusing to deliver the two rings to her. On the hearing of that summons Pickford was ordered by the police magistrate to deliver the two rings to Biddulph on payment by her to him of 3*l*., and in compliance with that order Pickford delivered the rings to her and received the sum of 3*l*. Corsi did not repay to Pickford the sum of 6*l*. or any part thereof.

On the hearing of the information the police magistrate was of opinion that Corsi, having been convicted of larceny of the rings, was not liable to be convicted of another criminal offence in respect of the same property and upon the same facts as those proved upon the conviction for larceny. He accordingly dismissed the information.

The question of law for the opinion of the Court was whether Corsi, having been convicted of the larceny of the rings as aforesaid, was thereby discharged from liability to proceedings under s. 33 of the Pawnbrokers Act, 1872, and whether under the circumstances aforesaid the magistrate was right in dismissing the information.

Avory, K.C., and *C. L. Attenborough*, for the appellant. It must be admitted that the offence, under s. 33 of the Pawn-

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as the Court directs; but if the party injured declines to accept of such satisfaction and costs, or if there is any surplus of the forfeitures, then the forfeitures or surplus (as the case may be) shall be paid to the overseers of the poor of the parish or place where the offence is committed, for the use of the poor thereof."

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brokers Act, 1872, is a criminal offence. The fact that the respondent had been convicted of stealing the rings cannot be a bar to a prosecution for pawning them after he stole them upon any ground of autrefois acquit or res judicata. The offence is not the same; the transaction is not the same; and the illegal pawning did not necessarily arise out of the larceny. In *Fancett* v. *Bierman* (1) it was held that the pawnbroker was a person injured under s. 33, and that is in effect a decision that the offence against the pawnbroker is a separate and distinct offence from that against the owner. By s. 33 the pawnbroker is given a remedy by which he can get some compensation, and that remedy cannot be taken away by the fact that the owner has prosecuted the pawner for larceny. The magistrate seems to have thought that a second prosecution upon the same evidence was barred like a second prosecution for the same offence; but that is not so: *Reg.* v. *Ollis*. (2)

No counsel appeared for the respondent.

LORD ALVERSTONE C.J. In my opinion, the learned magistrate was wrong in this case. Sect 33 of the Pawnbrokers Act, 1872, is a statutory provision for the protection both of owners of goods and also of pawnbrokers. The offence created by that section is that of knowingly and designedly pawning with a pawnbroker anything which is the property of another person without authority, and the penalty imposed is to be applied towards making satisfaction to the party injured and paying the costs of prosecution. It would be strange if, when a chattel has been stolen and then pawned by the thief, the pawnbroker should lose the remedy given by s. 33 if the thief has been prosecuted for larceny of the chattel and convicted. It would require very clear words in the statute to take away the remedy given to the pawnbroker because the person pawning the chattel has been convicted of stealing it. There is a broad distinction between cases in which the same facts and evidence go to establish the same offence, and cases in which they establish different offences of different degree.

(1) (1897) 14 Times L. R. 148. (2) [1900] 2 Q. B. 758, 780.

The magistrate was wrong in his view of the law, and this case must be remitted for reconsideration.

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LAWRANCE J. I agree.

Appeal allowed. Case remitted.

Solicitors for appellant: *Attenborough & Son.*

P. B. H.

[IN THE COURT OF APPEAL.]

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March 26.

DE LASSALLE *v.* GUILDFORD.

Landlord and Tenant—Agreement—Collateral Agreement—Parol Warranty that Drains are in order.

The plaintiff and the defendant negotiated for the lease of a house by the latter to the former. The terms were arranged, but the plaintiff refused to hand over the counterpart that he had signed unless he received an assurance that the drains were in order. The defendant verbally represented that they were in good order, and the counterpart was thereupon handed to him. The lease contained no reference to drains. The drains were not in good order, and an action was brought to recover damages for breach of warranty:—

Held, that the representation made by the defendant as to the drains being in good order was a warranty which was collateral to the lease, and for breach of which an action was maintainable.

APPLICATION for a new trial, or that judgment should be entered for the plaintiff in an action tried by Bruce J. with a jury.

The action was brought to recover damages for an alleged breach of warranty as to the condition of the drains of a house, and for fraudulent misrepresentation and breach of covenant. The plaintiff and the defendant entered into negotiations for the letting for a term of three years to the former of a house belonging to the latter, and the terms of the letting were arranged, and the counterpart of a lease was signed by the plaintiff. The case for the plaintiff was that he declined to part with the counterpart unless he received an assurance that the drains were in good order, and that on the verbal representation of the defendant that the drains were in good

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order the counterpart was handed to him. The lease contained no reference to drains. It turned out that the drains were not in good order, and the plaintiff and his family suffered in health, and the plaintiff was put to expense in altering the sanitary arrangements. The jury found that there was a representation by the defendant that the drains were in good order, they negatived fraudulent misrepresentation and breach of covenant, and they assessed the damage sustained by the plaintiff at 75*l*. The learned judge, after argument on further consideration, gave judgment for the defendant, being doubtful whether the jury had found that there was something which would amount to a warranty, and being of opinion that, even if there was a warranty, it would not be collateral to the lease so as to entitle the plaintiff to maintain an action.

The plaintiff appealed.

1901. March 8. *Robert Wallace*, *K.C.*, and *Israel Davis*, for the plaintiff. Assuming that the jury did not in fact find that there was a warranty, it has been agreed that it shall be left to the Court to say whether the true inference from the evidence is that there was a warranty, or merely a representation. It is submitted that the statement as to the drains, a matter on which the plaintiff could have no information, amounted to a warranty: Benjamin on Sales, 3rd ed. p. 607; *Brownlie* v. *Campbell*. (1) Such a warranty is collateral to a lease that contains no reference to drains: *Morgan* v. *Griffith* (2); *Erskine* v. *Adeane* (3); *Angell* v. *Duke*. (4) There is no distinction in principle between collateral agreements as to the existence of a certain condition at the time of the contract and as to matter to be done at a future time.

[They referred to *Green* v. *Symons*. (5)]

Bankes, *K.C.*, and *Shearman*, for the defendant. There was no warranty which in itself amounts to a contract, but only a representation of some particular quality or incident of the subject-matter as an inducement to enter into a contract with

(1) (1880) 5 App. Cas. 925, at p. 953.
(2) (1871) L. R. 6 Ex. 70.
(3) (1873) L. R. 8 Ch. 756.
(4) (1875) L. R. 10 Q. B. 174.
(5) (1897) 13 Times L. R. 301.

regard to it: *Kain* v. *Old*. (1) The jury have found that the representation was innocent; and for such a representation no action is maintainable: *Brett* v. *Clowser*. (2) In cases of demise, no action is maintainable on an innocent representation unless it is held to be a collateral agreement. The representation in this case was as to an existing fact, and not as to something to be done in future as in the cases relied on for the plaintiff. No cases have been cited in which a representation as to an existing condition was held to be a warranty on which an action could be brought, and there are dicta to a contrary effect: *Kennard* v. *Ashman* (3); *Longman* v. *Blount* (4); *Burtsal* v. *Bianchi*. (5) The contract in this case was in writing, and it must be taken that the writing was intended to be the whole contract. Cases in which there has been a demise by parol with an implied warranty have no bearing on the present case, because the representation would be a term of the contract.

Robert Wallace, K.C., in reply. All the cases recognise a warranty outside the written contract entered into by the parties. In *Palmer* v. *Johnson* (6) Bowen L.J. put that case: "Suppose the parties should make a parol contract, with the intention that it should afterwards be reduced into writing; and that that which is reduced into writing shall be the only contract, then, of course, one cannot go beyond it; but if they intend, as they might, that there should be something outside such contract, they might agree that that should exist, notwithstanding it was not in the contract which was put into writing." That is the present case, for the writing had been completed when the warranty was given.

Cur. adv. vult.

March 26. The judgment of the Court (A. L. Smith M.R., Collins L.J., and Romer L.J.) was read by

A. L. Smith M.R. This is an action for damages by a tenant against his landlord for breach of a warranty that the

(1) (1824) 2 B. & C. 627; 26 R. R. 497.
(2) (1880) 5 C. P. D. 376.
(3) (1894) 10 Times L. R. 213.
(4) (1896) 12 Times L. R. 520.
(5) (1891) 65 L. T. 678.
(6) (1884) 13 Q. B. D. 351, at p. 357.

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drains, at the time of the letting of the defendant's house to the plaintiff, were in good condition, whereas they were not, whereby illness supervened, and the plaintiff suffered damages, as the jury have found, to the extent of 75*l*. There were alternative causes of action, one founded upon a false and fraudulent representation, and the other upon a breach of covenant to repair the outside of the house after notice. These last two causes of action failed, because as to the one the plaintiff could not prove fraud, and as to the other because he failed to prove that the notice required by the covenant had been given to the defendant. The jury found, however, the disputed facts relating to the alleged warranty in favour of the plaintiff, and the questions which now arise are—first, does what the jury have found to have been stated by the defendant, in the circumstances in which the statements were made, amount to a warranty in law, or only to a mere representation, in which case no action for damages can be maintained without proof of fraud? secondly, if the statements found to have been made by the defendant amounted to a warranty, was such warranty a warranty collateral to the lease so as to be given in evidence and given effect to notwithstanding the lease?

Before considering these points it is necessary to see what it is that the jury have found to be the truth in this case as to the statements made by the defendant to the plaintiff's wife and daughter before the counterpart of the lease was handed over by the daughter to the defendant. The defendant's case was a flat denial that he had said anything about the drains. The jury acted upon the evidence of the wife and daughter, and, as these findings stand unimpeached, all that is left to the defendant to argue is that the statements made do not amount to a warranty but only to a representation, and that if they amount to a warranty it is not collateral to the lease and cannot be given effect to. Prior to February 28, 1899, the plaintiff, who was anxious about drainage, as he had suffered from bad drains in his previous house, by his wife on his behalf, had had interviews with the house agents about the drains of the defendant's house, and on February 21, 1899, the plaintiff wrote to the defendant as follows: "Mayfield, 21.2.99. Dear

Sir,—I beg to acknowledge your letter of the 14th inst. with inclosure." This was the draft agreement for tenancy for three years. "I shall be prepared to exchange the counterpart for the lease when executed, and shall be glad to hear from you accordingly in due course. Will you kindly inform me if the drains and all sanitary arrangements are in good order?" To this the defendant answered: "February 22, 1899. . . . As regards the drainage, that was tested and put into good order by me, including a new w.c. upstairs, when Mr. Rawlings went out." This did not, as it will be seen, satisfy the plaintiff; for, although on February 28, 1899, he sent his wife and daughter to the defendant, who took with them the counterpart, executed by the plaintiff ready to be exchanged for the lease if further assurances about the drains were obtained, he gave particular instructions to them that the counterpart was not to be exchanged for the lease until they got from the defendant the necessary assurance. The wife in her evidence stated: "I told the defendant that my husband before exchanging the agreement wanted a still further assurance as to the drains. I gave as my reason for this that we had before suffered from the drainage in the house in which we had been, and it made us more particular. I said my husband would like a certificate. He then said that he could give me his word for the perfect condition of the drains, that I need have no fear on the subject; and he repeated, 'I will give you my word—will that satisfy you?' I said I could not but be satisfied with his word, and accepted it. My daughter then said, 'We will exchange agreements then; I will give you the agreement,' and she handed it to him." In cross-examination the wife said: "I had in the very first instance told Nightingales, the house agents, I would not take a house in which the drains could not be guaranteed." The plaintiff's daughter in her evidence stated: "When we reached the defendant's office (he is a solicitor) my mother first of all spoke on the subject of the drains, and was very emphatic about wishing to know if they were in thorough good order, and suggested that we should have the sanitary inspector's certificate. The defendant said it was quite unnecessary, that the drains were in perfect condition, and we could take his

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word for it. . . . 'I give you my word upon the subject.' . . . I then handed the agreement to him." As before stated, the defendant's evidence was a flat denial that he had ever said anything at all about the drains to the wife or her daughter. Now do these proved statements by the defendant to the wife and daughter, in the circumstances in which they were made, afford evidence of a warranty, or only evidence of a representation? Bruce J., in a clear and accurate summing-up, undoubtedly directed the jury upon the question of warranty, also upon false representation, and also upon the breach of covenant. The questions he then put to the jury were these: Was there a breach of covenant? Then, he said, comes the question, Was there a warranty? Did he warrant and pledge himself that the drains were in perfect order? If he made the representation that the drains were in perfect order, did he do that falsely and fraudulently? The jury negatived fraud, and found no breach of covenant, on the ground that due notice had not been given thereunder. It will be seen from the shorthand notes that the jury, or some of them, for some reason had a difficulty about the word "perfect," though they unanimously found that the statement of the defendant was that the drains were in good order, and that they were not. The learned counsel for the defendant, upon the verdict being given, said, "Then, my Lord, it comes to this—that there is a verbal warranty, no fraudulent misrepresentation, and no breach of covenant." Bruce J.: "Yes." Mr. Shearman: "That raises the question of law." Bruce J.: "I will hear you on that." In my judgment, having read through the shorthand notes of Bruce J.'s summing-up and what took place at the end of the summing-up, I think that Mr. Shearman was quite accurate in what he said was the verdict. Afterwards, upon further consideration, Bruce J. doubted whether there was a sufficient finding that there was "something which would amount to a warranty," and he arrived at the conclusion that, even if there was, it would not be collateral to the lease. To get over this doubt of Bruce J.'s as to no sufficient finding of a warranty, the learned counsel on each side in this Court have left it to us, assuming the jury did not in fact find a warranty, though I

think they did, to say whether the true inference from the proved statements made is that there was a warranty or merely a representation by the defendant. Now what constitutes a warranty in law, or a mere representation? To create a warranty no special form of words is necessary. It must be a collateral undertaking forming part of the contract by agreement of the parties express or implied, and must be given during the course of the dealing which leads to the bargain, and should then enter into the bargain as part of it. It was laid down by Buller J. as long ago as 1789 in *Pasley* v. *Freeman* (1): "It was rightly held by Holt C.J." in *Crosse* v. *Gardner* (2) and *Medina* v. *Stoughton* (3), "and has been uniformly adopted ever since, that an affirmation at the time of sale is a warranty provided it appear on evidence to have been so intended." In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case it is a warranty, in the latter not: see Benjamin on Sales, 3rd ed. p. 607, whose statement upon the law, in my judgment, is accurate. That the above constitutes a warranty upon the sale of a chattel cannot be doubted, and why not upon the sale of real property, or upon the granting and taking of a lease if it be collateral? I know of no authority which shews, nor do I see any principle upon which it should be held, that, the like conditions existing, such an affirmation does not constitute a warranty upon, as in this case, the granting of a lease. Now, in the present case, did the defendant assume to assert a fact, or merely to state an opinion or judgment upon a matter of which he had no special knowledge, and upon which the plaintiff's wife, on behalf of her husband, might be expected also to have an opinion? What is it the defendant asserts? I paraphrase the evidence: "You need have no certificate of a

(1) (1789) 3 T. R. 51; 1 R. R. 634.
(2) (1688) Carth. 90, sub nom. *Cross* v. *Garnet*, 3 Mod. 261.
(3) (1699) Salk. 210; 1 Ld. Raym. 593.

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sanitary inspector—it is quite unnecessary; the drains are in perfect condition. I give you my word upon the subject. Will that satisfy you? If so, hand me over the counterpart." What more deliberate and emphatic assertion of a fact could well be made during the course of the dealing which led up to the counterpart lease being handed over to the defendant? That the question asked and the answer given were seriously intended, to use the words of Wills J. in *Best* v. *Edwards* (1), to be the basis of the contractual relation between the parties, I cannot doubt. There is the evidence that the plaintiff would not take the lease unless the drains were guaranteed, and surely the statements made by the defendant were not made on the assumption that they were to be of no avail to the plaintiff except they were made fraudulently. In my judgment everything necessary to establish a warranty has in this case been proved.

The next question is, Was the warranty collateral to the lease so that it might be given in evidence and given effect to? It appears to me in this case clear that the lease did not cover the whole ground, and that it did not contain the whole of the contract between the parties. The lease is entirely silent about the drains, though there is a covenant that the lessee during the term should do the inside repairs, and the lessor the outside repairs, which would, I suppose, include the drains which happened to be inside or outside the house. There is nothing in the lease as to the then condition of the drains—i.e., at the time of the taking of the lease, which was the vital point in hand. Then why is not the warranty collateral to anything which is to be found in the lease? The present contract or warranty by the defendant was entirely independent of what was to happen during the tenancy. It was what induced the tenancy, and it in no way affected the terms of the tenancy during the three years, which was all the lease dealt with. The warranty in no way contradicts the lease, and without the warranty the lease never would have been executed. Three cases were cited in which parol collateral agreements outside leases had been allowed in evidence and

(1) (1895) 60 J. P. 9.

given effect to by the Court, namely: *Morgan* v. *Griffith* (1); *Erskine* v. *Adeane* (2) in this Court, and *Angell* v. *Duke*. (3) The first two cases related to parol agreements collateral to leases as to keeping down rabbits, and the last case to a parol collateral agreement to do repairs and to send in additional furniture. This case was first decided in the Court of Queen's Bench upon demurrer upon the pleadings as they stood, when the parol agreement was held to be collateral and admissible in evidence; but when it came to the trial Blackburn J. refused to admit the evidence about the additional furniture, and the learned judge gave the following reasons for so doing (4): "Here the lease expresses the whole of the terms; the defendant agrees to let, and the plaintiff to take, the house and furniture at a certain rent; there is said to have been an arrangement made beforehand during the negotiation, that the defendant should let the plaintiff have more furniture for the same rent; how is this collateral? I cannot perceive that it is." In the present case, as above stated, the lease does not contain the whole terms of the bargain. In the rabbit cases the agreements were held collateral to the leases, and did not contradict the terms of the leases. It was argued by the learned counsel for the defendant that the collateral agreements in the rabbit cases were agreements that something should be done after the lease was taken, and that in the present case the agreement or warranty is that the drains were then in good order. This is true; but if in the rabbit cases the agreements were collateral and outside the leases, the leases not containing the whole terms and the collateral agreements not contradicting the leases, I cannot see why the warranty in this case is not collateral also. Then some cases were cited by the defendant's counsel to shew that representations as to drains were never held to be warranties; but when examined I do not think they shew this; for the representations in the cases cited were by no means such complete and emphatic statements of fact as were made in this case. And, indeed, upon principle why should there be any difference in the case of drains? First

(1) L. R. 6 Ex. 70.
(2) L. R. 8 Ch. 756.
(3) L. R. 10 Q. B. 174.
(4) (1875) 32 L. T. 320.

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came the case of *Green* v. *Symons* (1), which, in my opinion, so far as it goes is an authority against the defendant, and not in his favour. The verbal warranty alleged was that the house was dry and that the drains were perfect. The jury found that there was a verbal warranty as to the house being dry, and that the house was not dry, but that the drains were not defective, and assessed damages at 50*l*. Lawrance J., who tried the case, entered judgment for the plaintiff for that amount. Upon appeal this was set aside, not upon the ground that if there had been a warranty the judgment should not have stood, but upon the ground that what was said was a mere representation without fraud, and was made without authority; and neither Lord Esher M.R. nor Lopes L.J. nor Chitty L.J doubted that if there had been a warranty the action would have lain; for if it had been their opinion that it would not, it would have been a short end to the case. In *Kennard* v. *Ashman* (2) Wills J. held that it was clear that there was no warranty that the house was well built; but the learned judge does not seem to me to have held that if there had been a warranty and it had been broken, no action could have been maintained. On the contrary, in the case of *Best* v. *Edwards* (3) that learned judge clearly thought that if there had been a warranty an action would have lain. His decision was upheld upon appeal solely upon the facts of the case. In *Longman* v. *Blount* (4) Wright J. held that a warranty contained in a letter that the house was in a perfect sanitary condition could not be given in evidence, and directed judgment for the defendant, and somewhat invited an appeal. This apparently was not done. I should require further argument to convince me that this direction was correct. The question about it being too late to bring this action because of the lease having been executed was settled adversely to the defendant in this Court in the case of *Palmer* v. *Johnson*. (5) In my opinion, even if the jury had not found a warranty, the true inference is that there was a warranty given in this case collateral to the lease,

(1) 13 Times L. R. 301.
(2) 10 Times L. R. 213.
(3) 60 J. P. 9.
(4) 12 Times L. R. 520.
(5) 13 Q. B. D. 351.

and therefore the judgment entered for the defendant must be set aside, and judgment entered for the plaintiff for the 75*l.*, the amount found by the jury, and this appeal must be allowed.

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Appeal allowed.

Solicitors for plaintiff: *Atkinson & Dresser.*
Solicitors for defendant: *Woodbridge & Sons.*

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[IN THE COURT OF APPEAL.]

C. A. 1901 *May* 3.

THE KING ON THE PROSECUTION OF SAMUEL VINE *v.* THE BISHOP OF SALISBURY.

Ecclesiastical Law—Churchwarden—Election of Parishioners' Churchwarden—Right of Incumbent to Vote—Canon 89—*The Vestries Act*, 1818 (58 *Geo.* 3, *c.* 69), *s.* 3.

An incumbent of a parish, who, upon the failure of himself and the parishioners to agree upon the choice of churchwardens, exercises his right of appointing one churchwarden, is not entitled either by the common law, or under s. 3 of the Vestries Act, 1818, in his capacity as a ratepayer, to vote at the election of the second churchwarden.

Judgment of the Queen's Bench Division, [1901] 1 Q. B. 573, affirmed.

APPEAL from a judgment of the Queen's Bench Division on an application for a mandamus to the Bishop of Salisbury to admit the prosecutor to the office of churchwarden, reported [1901] 1 Q. B. 573.

At the annual vestry meeting held on April 23, 1900, for the election of churchwardens for the parish of Winterborne Came, in the county of Dorset and in the diocese of Salisbury, the rector appointed Mr. Cornish Browne to act as rector's churchwarden. For the office of parishioners' churchwarden two candidates were proposed—the prosecutor, Mr. Vine, and Mr. Passmore. Upon a poll being taken, twenty-nine votes were given for each candidate; but the votes given for Mr. Vine included six votes which the rector claimed to give as a ratepayer of the parish under the provisions of s. 3 of the Vestries

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Act, 1818. (1) The votes being equal, the rector, who was chairman of the meeting, gave a casting vote for Mr. Vine, and declared him duly elected. The year 1900 being the year of the triennial visitation of the Bishop of Salisbury, Mr. Vine applied to the bishop as the ordinary to admit him to the office of churchwarden. The bishop refused to do so on the ground that the rector, having appointed one churchwarden, had exhausted his power of voting, and had no right to vote at the election of the parishioners' churchwarden.

The prosecutor obtained a rule nisi for a mandamus to the bishop to admit him, which was discharged after argument. (2

The prosecutor appealed.

1901. April 16. *Bray, K.C.*, and *Edwardes Jones*, for the prosecutor.

Dibdin, K.C., and *C. W. Holgate*, for the defendant.

In addition to the authorities cited in the argument in the Court below, the following cases were referred to: *Reg.* v. *Kirby* (3); *Etherington* v. *Wilson* (4); *White* v. *Steele.* (5)

Cur. adv. vult.

1901. May 3. A. L. SMITH M.R., read the following judgment:—Prior to the passing of the Vestries Act, 1818, known as Sturges Bourne's Act, there can be no doubt that, if the minister and the parishioners of a parish did not agree as to

(1) 58 Geo. 3, c. 69, s. 2: "In case the rector or vicar or perpetual curate shall not be present the persons so assembled" (in pursuance of a notice of vestry meeting) "shall forthwith nominate and appoint by plurality of votes . . . . one of the inhabitants of such parish to be the chairman of and preside in every such vestry; and in all cases of equality of votes upon any question arising therein the chairman shall (in addition to such vote or votes as he may by virtue of this Act be entitled to give in right of his assessment) have the casting vote."

Sect. 3: "In all such vestries every inhabitant present who shall by the last rate which shall have been made for the relief of the poor have been assessed" shall be entitled to one vote if he was assessed on a value of less than 50*l.*, and if he was assessed upon a value of 50*l.* or upwards shall be entitled to one vote for every 25*l.* of assessment.

(2) [1901] 1 Q. B. 573.

(3) (1861) 31 L. J. (Q.B.) 3.

(4) (1875) 1 Ch. D. 160.

(5) (1862) 12 C. B. (N.S.) 383.

the appointment of the churchwardens, the minister appointed his churchwarden, and the parishioners appointed their churchwarden—that is, the people's churchwarden. The 89th canon of the Canons of 1603, which is declaratory of the common law, makes this abundantly plain. The canon is as follows: "All churchwardens or questmen in every parish shall be chosen by the joint consent of the minister and the parishioners, if it may be; but if they cannot agree upon such a choice, then the minister shall choose one and the parishioners another; and without such a joint or several choice none shall take upon them to be churchwardens." I agree with my brothers Wills and Channell that in this canon the parishioners are mentioned in such a way as to shew that, in case the vestry cannot agree, the minister is to choose his own churchwarden, and the parishioners, as opposed to and distinguished from him, are to choose their churchwarden. The term "parishioners" in the canon means, in fact, the minister's parishioners, and would not include the minister himself. Accordingly, it is not in dispute that in practice the minister never did take part in the voting for the parishioners' churchwarden. But it is said on behalf of the appellant that the effect of Sturges Bourne's Act was to alter the position of affairs, and that, while it left unaffected the right of the minister to choose his own churchwarden, it at the same time gave him the right to vote in the election of the parishioners' churchwarden.

Now, in the first place, it is to be observed that the Act, which is intituled "An Act for the Regulation of Parish Vestries," is perfectly general in its character, and does not refer in terms to the election of churchwardens, or purport to alter the then existing law and practice, whereby, at a vestry meeting, in case of the vestry not agreeing in the selection of the churchwardens, the minister, who is part of the vestry, was entitled on the one hand to choose his churchwarden, and the parishioners on the other hand, as distinguished from the minister, were at the vestry meeting entitled to vote for the parishioners' churchwarden. On the best consideration I can give to the matter, I do not think that the Act was intended to alter, or that on its true construction it did alter, the existing

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law and practice in the way contended for by the prosecutor. If the Act was intended to alter the existing law and practice as to the election of churchwardens in the way contended for, it is difficult to see why it should not also have altered the right of the minister to choose his own churchwarden. But the prosecutor shrinks from contending this, and, indeed, such a contention could not be supported. I think that the true reading of the Act is that, although the class of persons who as parishioners are entitled to vote at a vestry meeting, and their franchise, are by the Act altered, yet the election of churchwardens was not otherwise intended to be altered or affected, so that, in case of the vestry not being able to agree, the minister is still entitled to choose his churchwarden, and his parishioners apart from him, though presided over by him as chairman if he be present, are entitled to vote for the other churchwarden. I understand that the point now taken by the prosecutor—namely, that the minister can now vote for the people's churchwarden—is a novel one, and that, although Sturges Bourne's Act has been in operation since June 3, 1818, the practice has been to act upon the construction of the Act adopted by me.

The view of the Act I have expressed is borne out by an examination of its material sections. Sect. 1, after reciting that it is expedient to regulate the manner of holding parish vestries and the right of voting therein, enacts that public notice shall be given of the vestry meeting and the special purpose thereof, and by s. 2 it is enacted that, in case the rector, vicar, or perpetual curate shall not be present, the persons so assembled in pursuance of such notice shall forthwith nominate and appoint by plurality of votes to be ascertained as thereinafter directed—that is, by every inhabitant present who has the new franchise conferred upon him by s. 3—one of the inhabitants of such parish to be the chairman and preside in every such vestry, and in all cases of equality of votes, upon any question arising therein, the chairman shall, in addition to such vote or votes as he may by virtue of this Act be entitled to give in right of his assessment, have the casting vote. This 2nd section appears to me only to deal with those cases in

which there is an equality of votes amongst those present who on the subject voted upon are entitled to vote. I cannot find in this section any indication that where the voting is upon the election of the parishioners' churchwarden, and the minister is chairman, he is to be entitled to vote as a parishioner, and then, if the votes be made equal by his vote, have a right to vote as chairman. The next section (s. 3) enacts that in all vestries the inhabitants present shall be entitled to vote according to the new franchise prescribed in that section. That section is perfectly general, and no doubt regulates generally who are to vote at vestries and what votes they shall have. But full effect can be given to it as a general enactment without implying that the minister shall have the right to vote for the people's churchwarden, or that the parishioners shall vote for the minister's churchwarden. It will be noticed that throughout this section there is not a word said as to the questions upon which, or the persons for whom, the voters with the new franchise are to vote, and in my judgment it leaves untouched the question as to how churchwardens are to be chosen.

It appears to me that after the Act, as before it, if the vestry cannot agree in selecting the churchwardens, they are to be selected one by the minister and the other by his parishioners. The choice of the parishioners, apart from the minister, could, and would, be ascertained by their votes in the manner prescribed by the Act. I see no sufficient reason why this should not be done without its following as a necessary corollary that the minister is to vote in his character of parishioner, or inhabitant, or ratepayer. I agree in the view taken by my brother Channell that the machinery and procedure of the Act can be applied in taking the votes on the question as to the election of the parishioners' churchwarden without its thereby following that the minister is to vote in his character of ratepayer. It does not appear to me to be necessary to review the authorities, which have been sufficiently dealt with in the Court below. In the result I agree with the Divisional Court, and think that this appeal should be dismissed.

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VAUGHAN WILLIAMS L.J. I agree. I do not think Sturges Bourne's Act meant to alter the respective relative rights of the parson and his parishioners in the matter of selection and election of churchwardens by the one and the other.

ROMER L.J. I agree.

Appeal dismissed.

Solicitors for prosecutor: *Jenkins, Baker, Behrens & Wreford Brown.*

Solicitors for defendant: *Robins, Hay, Waters & Hay, for Ffooks & Douglas, Sherborne.*

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C. A. 1901 *April* 22.

[IN THE COURT OF APPEAL.]

BARTLETT *v.* HIGGINS.

Practice — Costs — Taxation — Witness — Examination before Examiner — Depositions not used at the Trial—"Costs in the Action"—Allowing Costs of unused Depositions or Proceedings—Taxing Master—Discretion—Rules of Supreme Court, 1883, *Order* LXV., *r.* 27 (29).

In the taxation of the costs of an action in which the examination of a witness under the common order before trial has not been used at the trial for some reason, such as the attendance of the witness at the trial or the taking of a judgment by consent, the costs of the examination should not be disallowed under Order LXV., r. 27 (29), merely on the ground that the use of the examination had become unnecessary. The true test in exercising the discretion given to the taxing master by the rule is whether the costs of the examination were "necessary or proper for the attainment of justice" under the circumstances existing at the time the examination was ordered, irrespective of the eventual state of circumstances at the trial.

There is no hard and fast rule of taxation that the costs of a proceeding should not be allowed unless it has been actually used for some purpose.

Delaroque v. *S. S. Oxenholme & Co.*, (1883) W. N. 227, approved.

Ridley v. *Sutton*, (1863) 1 H. & C. 741; 32 L. J. (N.S.) (Ex.) 122, disapproved.

THIS was an action commenced in November, 1899, by the plaintiff, who had shortly before attained his majority, claiming relief in certain money-lending transactions. The plaintiff was at the time an officer in the militia and had volunteered for

military service in South Africa. His regiment was leaving for South Africa in drafts, and he himself was expecting an order to go out with a draft at any time on two days' notice. He accordingly went to the major of his battalion, and, after informing him that he had private affairs to settle, asked whether there was any probability of his receiving orders to go out. To which the major replied that he was certain to go, that he had better settle his affairs at once, and that he might have three days' leave for the purpose. Thereupon, acting on the advice of his solicitors, he applied for, and on January 12, 1900, obtained from Master Johnson, in the presence of the defendants, an order in the usual form directing that he should be examined before an examiner, and "that the costs of this application shall be costs in the cause." The examination took place on January 17 and 18, 1900, the parties being represented by counsel, and the plaintiff was examined and cross-examined for the greater part of the two days.

On June 29, 1900, the action came on for trial before Grantham J. The plaintiff had not then received orders to proceed to South Africa, and he accordingly attended the trial, in readiness to be called to give evidence in the usual way. But his leading counsel, while opening the case, was stopped by the defendants' counsel, who offered to submit to a judgment conceding in effect the whole of the plaintiff's claim; whereupon judgment was taken by consent according to the terms agreed, the defendants being directed "to pay the plaintiff's costs of this action." Shortly afterwards the plaintiff, who had received a commission in the regular service, was ordered to South Africa, where he now was.

The plaintiff's bill of his "costs of the action" carried in for taxation included the costs of his examination before the examiner, but these costs Master Johnson disallowed. The plaintiff's solicitors then carried in objections to the taxation, stating their belief that if he had been called upon to start for South Africa (which might have happened at any moment) and his evidence had not been taken, the defendants would not, in the plaintiff's absence at the trial, have consented to judgment as they had done, and the plaintiff would have been

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defeated: moreover, that his solicitors would have been guilty of serious negligence with regard to their client and liable for all the consequences had they not obtained an order for his examination.

The matter then again came before the master, who, in his answers to the objections, stated that, in his opinion, his taxation was right, for the following reason: "The examination of the plaintiff was useless and the costs of it were thrown away. The plaintiff never went to South Africa and he attended the trial. He would, I should suppose, have had no difficulty in deferring going abroad until the action was over. The point was fully considered in *Ridley* v. *Sutton* (1); and under Order LXV., r. 27 (29.), in my opinion, the master ought not to allow such costs as between party and party."

The plaintiff then appealed to Ridley J., whose attention was called to the apparently conflicting case of *Duke of Beaufort* v. *Earl of Ashburnham* (2); but the learned judge thought that the preponderance of authority and practice was in favour of the master's view. He, however, expressed his opinion that the costs had been properly incurred, and said he would have exercised his discretion in favour of reversing the master's decision if it had been a matter of discretion. He further intimated that the point was of sufficient importance to be taken to the Court of Appeal, and reserved the costs of the application.

The plaintiff appealed to the Court of Appeal. The appeal was heard on April 22, 1901.

Bray, K.C., and *W. B. Allen*, for the plaintiff. The real question here is as to the true meaning of Rules of the Supreme 1883, Order LXV., r. 27 (29.) (3), under which the taxing master has to consider whether the costs of the examination "have been necessary or proper for the attainment of justice," or

(1) 32 L. J. (N.S.) (Ex.) 122.

(2) (1863) 32 L. J. (C.P.) 97.

(3) Order LXV., r. 27 (29), is as follows: "As to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper for the attainment of justice or defending the rights of the party, or which appear to the taxing officer to have been incurred through overcaution, negligence, or mistake, or merely at the desire of the party."

whether they "have been incurred through over-caution, negligence, or mistake." The two cases cited before the learned judge, *Ridley* v. *Sutton* (1) and *Duke of Beaufort* v. *Earl of Ashburnham* (2), which was decided six days before, but was not referred to in, *Ridley* v. *Sutton* (1), were cases upon the old rule contained in s. 9 of 1 Will. 4, c. 22; but so far as those cases lay down any principle applicable to taxation under the new rule, the *Duke of Beaufort* v. *Earl of Ashburnham* (2) lays down the more correct principle, which also seems to have been adopted by Field J. in *Delaroque* v. *S. S. Oxenholme & Co.* (3), a case very similar to the present. In Chitty's Archbold's Practice, 14th ed. p. 542, where the above cases are referred to, it is stated that under the present rule the costs of unused depositions may be allowed where they have been "reasonably incurred." There is no such hard and fast rule as is said to have been laid down in *Ridley* v. *Sutton* (1), and the question whether the costs of unused depositions should be allowed or not must depend upon the circumstances of each particular case. Here, the only point is whether the costs were "necessary or proper." It was most reasonable that the plaintiff, who was expecting to be sent out to South Africa at any moment, should apply to have his evidence, which was vital to his case, taken at once. In fact, in the result, the examination saved time, for as his evidence had been thoroughly tested under it, the defendants, when the case came to trial, arrived at the conclusion that they could not sustain their defence, and accordingly consented to judgment. The learned judge himself, it seems, would have overruled the master's decision had he not felt himself bound by *Ridley* v. *Sutton*. (1) But it is open to this Court now to reconsider the point.

Rufus Isaacs, K.C., *M. Shearman*, and *E. Hills*, for the defendants. The matter has been rightly decided by the taxing master and Ridley J. The plaintiff was not officially ordered on service in South Africa: he offered his services

(1) 1 H. & C. 741; 32 L. J. (N.S.) (Ex.) 122.

(2) 13 C. B. (N.S.) 598; 32 L. J. (C.P.) 97.

(3) W. N. (1883) 227.

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as a volunteer; and as a precaution he obtained an order for his examination. In point of fact, he remained in England and attended the trial, ready to be called as a witness. It would be onerous to throw the expense of the examination upon the defendants merely because the plaintiff thought he had better take the precaution of giving his evidence before an examiner. That was nothing more than a "convenience" for conducting litigation—a "luxury" which must be paid for by the party incurring it: per Malins V.-C. in *Smith* v. *Buller*. (1) In *Curling* v. *Robertson* (2) it was held that the successful party in a cause could not be allowed the costs of an examination not used at the trial; and that must be taken to be the right rule. *Delaroque* v. *S. S. Oxenholme & Co.* (3) is distinguishable, for in that case, after the plaintiff's evidence had been taken on commission, there was an amendment in the defence making further allegations against him on a matter not touched by the evidence, and therefore, as the judge held, it was better for him to stay and give his evidence on that point at the trial. Moreover, the judge made no attempt to deal with the authorities, which apparently were not cited to him. The allowance or disallowance of costs in such cases is a matter for the discretion of the taxing master; and neither in *Ridley* v. *Sutton* (4) nor in *Duke of Beaufort* v. *Earl of Ashburnham* (5) was the discretion of the master overruled. In the latter case there was no opposition to the application, and the point was not argued out as it was in *Ridley* v. *Sutton*. (4) The master has exercised his discretion under the present rule, after due consideration of the previous practice, on the ground that the costs were incurred by the plaintiff for greater security only, and his decision has been affirmed by the judge. The master's discretion under the rule was properly exercised, and should not now be interfered with.

COLLINS L.J. This is a case of some importance, as it deals with a matter of practice. Such questions may arise in every

(1) (1875) L. R. 19 Eq. 473, 475.
(2) (1844) 7 Man. & G. 525.
(3) W. N. (1883) 227.
(4) 1 H. & C. 741; 32 L. J. (N.S.) (Ex.) 122.
(5) 13 C. B. (N.S.) 598; 32 L. J. (C.P.) 97.

case, and therefore they have an importance quite out of proportion to the amount at stake in a particular instance. I should be very loth indeed to overrule the discretion of the master, especially of one of such experience as Master Johnson; but I think the master has not really exercised untrammelled discretion, because it appears to me that he felt himself bound by *Ridley* v. *Sutton*. (1) I do not think that the decision of the Court of Exchequer is an authority binding upon us now, and it is no authority upon the rule we have here to consider. However, we have not merely the discretion of the master, but we have also the view of the learned judge upon the point; and although the judge decided it in accordance with the view of the master, it seems to me that the judge himself would clearly have exercised his discretion the other way had he not also felt himself bound by the decision in *Ridley* v. *Sutton*. (1) That case was decided in 1863, and it is very important to see what it did decide. As the law then stood, applications of this kind were regulated by s. 9 of 1 Will. 4, c. 22, which provided that the costs of any examination ordered under s. 4 should be costs in the cause, unless otherwise directed either by the judge who made the order for examination, or by the judge before whom the cause might be tried, or by the Court. Now the Court of Exchequer, in dealing with an application under that section, arrived at the conclusion, as it seems to me, that the section itself did not apply at all to a case where, in point of fact, the examination so taken was not used at the trial, and therefore they said that the rule of the section—that the costs of the examination were to be costs in the cause—did not apply in such a case, because the examination was not read in evidence. According to the *Law Journal* report, Pollock C.B. says (2) (and this seems to be the cardinal point in his judgment): "Suppose it turns out that the examination is read, very unnecessarily, to prove some fact, which, though material to the cause, might have been proved by a tenth part of the expense. The examination has been read; but the judge, who tries the cause, must see at once that this is a very unnecessary expense, and he may direct that it

(1) 1 H. & C. 741; 32 L. J. (N.S.) (Ex.) 122. (2) 32 L. J. (N.S.) (Ex.) 122.

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should not be allowed. The Act of Parliament only applies to a case where the examination becomes part of the proceedings, and is productive when used as evidence; and I cannot think that the opposite party referring to it, as a paper signed by the witness, so as to contradict him, makes it such a user as to be within the rule of the Act of Parliament."

Channell B. says: "I think it was intended by the section I have read, to provide that the costs of such examination shall be costs in the cause, in reference to this, that the evidence should be used at the trial; because before this statute passed, though the witness was examined and the evidence used, the costs were not costs in the cause; and that it is intended to remedy this, and to make the evidence used, though obtained under an order for a commission, costs in the cause."

And perhaps the point is put more distinctly in the judgment of Channell B. as it appears in the other report (1): "Before the Act 1 Will. 4, c. 22, there was no means of getting these costs although the examination was given in evidence at the trial; and I think the Act intended to remedy that mischief, and to provide that the costs should be costs in the cause, where the examination was used as evidence."

Rightly or wrongly, that is the basis of the decision, and I think it was a decision upon the circumstances of that particular case, that the question was not one of discretion at all. The Act did not, under the circumstances, allow the discretion or let in the rule that the costs should be costs in the cause. Therefore, in effect, it was a decision refusing to exercise discretion. That was the view taken by the Court of Exchequer; but almost simultaneously there was a case of *Duke of Beaufort* v. *Earl of Ashburnham* (2), in the Court of Common Pleas, where that Court took quite a different view of s. 9, and considered that they undoubtedly had a discretion. This is what Erle C.J. says (3): "But was the attorney justified in taking the witness's examination beforehand? The master reports to us that this was entirely an act of prudence and discretion. That may well be, and yet it may not be right that the expense

(1) 1 H. & C. 745.

(2) 13 C. B. (N.S.) 598; 32 L. J. (C.P.) 97.

(3) 13 C. B. (N.S.) 601.

should be thrown upon the opposite party." Then he refers to s. 9 of the statute 1 Will. 4, c. 22, and says: "We have, therefore, a discretion over these costs; and I am clearly of opinion that it was an act of commendable prudence on the part of the attorney to have the evidence of Rumsey perpetuated, and that the master would not under the circumstances have been justified in refusing to allow these costs." There quite a different principle is laid down.

Leaving, then, those authorities as they stand, I come to the rule under the Judicature Act in order to see which of those two authorities should be adopted. Now these are the words of the rule before us—Order LXV., r. 27 (29): [The Lord Justice read it, and continued:—]

Now, what is the meaning of that? Surely it makes the standard for consideration, not the event which actually happened, but whether, when the order for examination was applied for, proper prudence was exercised, or whether there was "over-caution, negligence, or mistake." In fact, it makes the standard or governing point for consideration the state of things before the legal adviser at the time he makes up his mind. Now, a party is not to be allowed costs incurred "through over-caution, negligence, or mistake." But what is to be said as to costs incurred through a step taken with reasonable prudence? Are they not to be paid? The rule points to the inference that where the advice given was given from over-caution, negligence, or mistake, the costs should not be allowed. But that result is impliedly negatived and the contrary suggested where the examination has been taken through reasonable caution without negligence. Now, the question is which of these two standards the taxing master should have selected in order to decide whether the costs of this examination were "necessary or proper for the attainment of justice"—the time when and the circumstances under which the legal adviser had to act, or the circumstances that took place at the trial itself. In my opinion, he should have chosen the first alternative. The matter does not rest merely on the rule, because we have a decision of Field J. since the Judicature Act, 1873, and it appears to me that he has lent the weight

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of his authority to the construction I am now suggesting. That is in the case of *Delaroque* v. *S. S. Oxenholme & Co.* (1) That case is very much in point—practically on all-fours with the present case. There the master had disallowed certain items in the bill of costs of the plaintiff relating to his examination, which was taken before the trial under an order, he being a sailor and about to proceed to sea. The plaintiff returned from his voyage before the trial, and gave his evidence vivâ voce, so that his examination was not used. That is practically the same case we have here. The master disallowed the costs of the examination on the ground that it had become unnecessary to use it at the trial. In giving judgment Field J. said this: "It was said in argument that this was done by reason of a rule that the costs of a proceeding should not be allowed unless it was actually used for some purpose." That looks as if *Ridley* v. *Sutton* (2) had been brought to the learned judge's attention in the argument. Then he proceeds: "I should require to be better satisfied of the propriety of such a rule than I am at present before I acceded to it." That is really an expression of dissent from the decision of the Court of Exchequer in *Ridley* v. *Sutton*. (2) Upon reading the judgment of the learned judge it seems to me that what he intended to lay down was this: that the question in such a case is, whether the examination was a proper and reasonable step at the time it was ordered, quite independently of the fact that afterwards at the trial it may turn out to have been unnecessary.

Now, our attention has been called to one or two other cases. The first case, *Smith* v. *Buller* (3), before Malins V.-C., was clearly a case which was one of certain costs which the Vice-Chancellor described as "luxuries." That is quite a different matter from the costs of obtaining evidence that may be absolutely vital, and the decision of the Vice-Chancellor does not appear to touch the point. The only question is whether, the evidence being rightly regarded as vital at the time it was taken, it should, in the event of its being found unneces-

(1) W. N. (1883) 227. (2) 1 H. & C. 741; 32 L. J. (N.S.) (Ex.) 122.
(3) L. R. 19 Eq. 473, 475.

sary or impossible to use it, be regarded as "unnecessary or improper."

Then the case of *Curling* v. *Robertson* (1) was referred to; but that case is not opposed to the principle which Field J. applied. There the defendant examined a witness upon interrogatories, but, finding the examination did not help his case, he did not use it at the trial. The Court, therefore, regarded the examination as a mere experiment, and on that ground I can quite understand that the costs of it were disallowed.

Now we come to the case before us. Mr. Rufus Isaacs has suggested that it was not really necessary to take the examination at all: that there was no reason to suppose the plaintiff was going to South Africa. It seems to me that inasmuch as the plaintiff, an officer who had volunteered, was liable, with other persons exactly in a similar position, to be sent out to South Africa at very short notice, and his commanding officer was himself perfectly sure that he would have to go and so gave him three days' leave to settle his affairs, it would have been negligence on the part of the solicitor not to take notice of a fact so absolutely vital to his client. It was a prudent, and I might say almost a necessary, step for the solicitor to take his evidence: I have no doubt as to that. Then how does that bear on the question of allowing or disallowing the costs of taking his evidence? It seems to me that those costs were distinctly necessary and proper at the time the order for examination was made by the master. By that order he made the costs of the examination costs in the cause, which shews that he thought at that time it was reasonable and prudent to take the evidence; and I do not think any one would have said the contrary at the time the order was made.

I think, for the reasons I have given, that the requirements of the rule have been abundantly satisfied, and that we are not fettered by the decision in *Ridley* v. *Sutton*. (2) We can, therefore, give effect to what was clearly the view of the learned judge himself. He has, in fact, invited our opinion; and in my judgment we are abundantly justified in giving effect to his view.

(1) 7 Man. & G. 525. (2) 1 H. & C. 741; 32 L. J. (N.S.) (Ex.) 122.

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STIRLING L.J. I am of the same opinion. The only difficulty I have felt is with regard to the propriety of overruling the decision of a master of Master Johnson's experience; but it appears to me that his judgment was largely governed—as was that of Ridley J. when the case came before him—by the authority of *Ridley* v. *Sutton* (1), which they both treated as applicable to the present case. My brother has dealt very fully with that case; and I will only say that it relates to the rule contained in s. 9 of the statute 1 Will. 4, c. 22. But here we have to consider Order LXV., r. 27 (29.), which defines the costs which are or are not to be allowed as between party and party. The rule is as follows: [The Lord Justice read it, and continued:—]

In my judgment, it is not correct to say that costs are not to be allowed simply because in the ultimate event they turn out to have been unnecessary. The taxing master must not consider whether they have been "necessary" having regard to the event, but whether they "have been necessary or proper for the attainment of justice"—that is (as I think), necessary or proper having regard to the state of things at the time the examination was ordered. That, it seems to me, is the time with reference to which the propriety of incurring the costs should be considered. I cannot see that the costs here were incurred through "over-caution, negligence, or mistake." It appears to me that the step of procuring this order and having the examination taken was an eminently proper one; and therefore I think the order of Ridley J. should be reversed and the appeal allowed.

COLLINS L.J. The case will go back to the taxing master for taxation, and the plaintiff must have his costs both on this appeal and in the Court below.

Appeal allowed.

Solicitors: *Hores, Pattisson & Bathurst; F. O. Chinner.*

(1) 1 H. & C. 741; 32 L. J. (N.S.) (Ex.) 122.

G. I. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1901
May 14.

WHITE *v.* SPAFFORD & CO.

Practice—Discovery—Affidavit of Documents—Further Affidavit—"Specific Documents"—Rules of Supreme Court, Order XXXI., *r.* 19A (3).

To justify an application for discovery of documents under rule 19A (3) of Order XXXI., the party making the application must in his affidavit name and specify, so that they can be identified, the particular documents of which he desires discovery.

It is not sufficient to make a general affidavit based on a priori reasoning that certain classes of documents must be in his opponent's possession or power.

The discovery sought must be of a species, not a genus.

APPEAL against an order of Day J., affirming an order of the district registrar at Manchester, that the plaintiff should file a further and better affidavit of documents.

By his statement of claim the plaintiff claimed damages for the refusal of the defendants to accept 280 pieces of coloured curtains which the plaintiff had manufactured for them in pursuance of an agreement dated July 25, 1899.

By their defence the defendants said that it was an implied condition of the alleged contract that the curtains should be reasonably fit for exposure to sunlight, and that the colours of the curtains should be fast against sunlight, and that the defendants were justified in refusing to accept the curtains tendered to them by the plaintiff, because they were not reasonably fit for exposure to sunlight, and the colours were not fast against sunlight.

The plaintiff was ordered to make an affidavit of documents in his possession relating to the matters in question, and he made an affidavit accordingly.

The defendants were not satisfied with this affidavit, and they applied, under rule 19A (3) of Order XXXI., for an order that the plaintiff should make a further and better affidavit of documents. In support of the application one of the defendants filed an affidavit, in which he said—

"(1.) That he had read a copy of the plaintiff's affidavit of

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documents, and that, to the best of his knowledge, information, and belief, that affidavit did not disclose all the documents in the plaintiff's possession relating to the matters in dispute and material to the defence.

"(2.) Before any litigation was thought of between my firm and the plaintiff, it was known to me, from communications with Mr. Joseph White, the plaintiff's representative, that the goods in question in this action were not manufactured by the plaintiff, but were manufactured for the plaintiff by a manufacturer whose name was not disclosed to me. The terms of such contracts are clearly most material to my firm's defence in this action, as also is the correspondence between the plaintiff and such manufacturer.

"(3.) After the dispute arose, but before litigation between my firm and the plaintiff, I am informed and believe that there was correspondence between the plaintiff and the manufacturer, and the communications between them in respect thereof were the subject of conversations between the said Joseph White and myself.

"(4.) I am informed and believe that the plaintiff has in his power or possession original letters from his said manufacturer, bearing upon the nature and quality of the said colours, and press copies of his letters to such manufacturer of and in relation to such colours, written before the action.

"(5.) Further, the said Joseph White in my presence, during the negotiations with the plaintiff prior to action, made certain notes and memoranda in writing, which are now, I am informed and believe, in the plaintiff's possession or power, and I claim the production of the same. I am also informed and believe that there are correspondence and memoranda passing between the plaintiff and the said Joseph White in relation to the matters in question in this action, which correspondence and memoranda are now in the plaintiff's possession or power.

"(6.) Further, I verily believe that there are in the plaintiff's possession letters of complaint in respect of similar goods to those in question in this action from other customers of the plaintiff, and in particular from Messrs. Daniel Lee of Manchester, merchants, who bought from and had delivered by the

plaintiff goods of a similar description, and under contracts substantially the same as that which my firm made with the plaintiff.

"(7.) In the plaintiff's books of account (by whatever name they are called) in the ordinary course of business there are, I believe, entries made at the time of the orders in question, and at the time of the deliveries, and from such entries are made entries in the plaintiff's ledger or ledgers, none of which books the plaintiff has disclosed, all of which entries I verily believe are material to the disputes in this action.

"(9.) Without in any degree questioning the bona fides of the plaintiff and his advisers, I, speaking as a man of business with thirty years' experience of all kinds of similar disputes in the same trade, say that the books, documents, and correspondence hereinbefore referred to as being in existence, and not disclosed by the plaintiff, must of necessity have a bearing upon the disputes between the plaintiff and my firm, and I verily believe will assist my firm in either defeating the plaintiff's claim or in supporting my firm's defence.

"(10.) And I further believe that the same books, documents, and correspondence are in the possession and power of the plaintiff, and that my firm and its solicitors and agents are entitled to discovery and inspection thereof, and that my firm cannot safely proceed to trial without such discovery and inspection."

The registrar ordered that the plaintiff should within ten days "file a further and better affidavit of documents stating which (if any) of the following letters and documents he has now or has at any time had in his possession or power, and if not now in his possession when he parted with the same and what has become thereof:—

"(*a.*) Original letters from the person or firm who manufactured the goods in question in this action for the plaintiff leading up to the order from the plaintiff to such manufacturers, and press copies of letters from the plaintiff to such person or firm.

"(*b.*) The contract or contracts entered into by the plaintiff with the manufacturer of such goods.

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"(*c.*) The correspondence, letters, and press copies between the plaintiff and the said manufacturers in relation to the goods in question and to their delivery, and particularly the complaints of the defendants' firm as to the fugitive nature of the said colours as against sunlight.

"(*d.*) The invoices sent by the said manufacturers to the plaintiff, and all entries in every of the plaintiff's books following thereon in relation to the goods sold to the defendants.

"(*e.*) The books of account and press copy letter-books of the plaintiff in which are entered or copied any memorandum or minute relating to the sale of the goods so manufactured, or in relation to complaints respecting the nature of the colours of such goods.

"(*f.*) The communications received by and sent to Joseph White of and in relation to the goods and colours, and his notes, diary, entries, and memoranda relating thereto."

Day J. affirmed this order.

The plaintiff (with the leave of the Court) appealed.

Pickford, K.C., and *Roe Rycroft*, for the plaintiff. The defendants' application for a further and better affidavit by the plaintiff was made under rule 19A (3.) (1) of Order XXXI. That rule is aimed at "specific" documents—documents which can be specifically described and identified. The rule does not justify a merely fishing application such as this, which is as unlike an application for specific documents as can well be. The registrar and the learned judge relied on *Ehrmann* v. *Ehrmann* (2), but that case has really no application to the

(1) Order XXXI., r. 19A (3): "The Court or a judge may, on the application of any party to a cause or matter at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been in his possession or power; and, if not then in his possession, when he parted with the same, and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the cause or matter, or to some of them."

(2) [1896] 2 Ch. 611.

present case. If a party cannot bring himself within the rules as to discovery, he must do without discovery. He will still be able to interrogate his opponent: *Jones* v. *Monte Video Gas Co.* (1) Rule 19A (3.) was framed in consequence of the decision in that case, that "an affidavit of documents is conclusive against the person seeking discovery, unless it can be shewn, either from the affidavit itself, or from the documents therein referred to, or from an admission in the pleading of the party swearing the affidavit, that other documents exist in his possession or power which are material and relevant to the action." The rule speaks of "any one or more specific documents"; it does not mean a whole class of documents.

Bray, K.C., and *Le Riche*, for the defendants. The documents of which discovery is sought are sufficiently identified; they could not be more clearly described, and they are clearly relevant to the matters in issue. Relevancy is the question; the value of the documents to the defendants when discovery has been made is immaterial for the present purpose.

COLLINS L.J. The learned judge, under rule 19A (3.) of Order XXXI., has ordered the plaintiff to make a further and better affidavit of documents. Now, that rule was framed to remove what was thought to be a defect in the then existing law as laid down in *Jones* v. *Monte Video Gas Co.* (1), and the rights of the parties on the present application must be ascertained by reference to that rule. [The Lord Justice read the rule.] Now reading that rule, and having regard to its express terms, and also to the state of the law at the time at which it was framed, it seems to me perfectly clear that its object is that a litigant who can point to specific documents, which he is able to name and specify in his affidavit, and who is in a position to swear that in his belief they are or have been in the possession of his opponent, and that they relate to the matters in question in the action, shall have a right to discovery of those particular documents. But the key of the position is

(1) (1880) 5 Q. B. D. 556, 558.

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this—that there must be an affidavit of his belief as to specific documents capable of being named and specified. The rule applies only where those conditions are fulfilled. It is obviously not intended to give to the party who is seeking discovery, upon a mere general affidavit, based upon a priori reasoning, asserting that he has reason to believe that letters must have passed between his adversary and some third person, or that books or other documents must exist relating to the subject-matter of the action, a right to discovery of those documents. The rule was obviously not intended to cover that ground at all. That ground had been already covered by the original affidavit of documents, in which the person who has to make discovery is to state upon oath what documents in general, without reference to any specific documents, he has in his possession or power relating to the subject-matter of the action. When he has done that he has primâ facie discharged his duty. But then a difficulty arose when the party seeking discovery was not satisfied that his opponent had really discharged his duty by making full discovery, and attempts were made to lay down the conditions under which documents, the possession of which had not been avowed in the original affidavit of documents, might be reached. Those conditions were limited by *Jones* v. *Monte Video Gas Co.* (1), and it was to meet this difficulty that rule 19A (3.) was introduced. But it must be remembered that the basis of it is that the party from whom further discovery is sought has in the first instance primâ facie discharged his obligation to state upon oath all the documents in his possession or power which are relevant to the matter in dispute. Then what more is desired? The rule apparently provides that, though primâ facie the original affidavit has disclosed everything, still if the opponent can make an affidavit that in his belief some specific documents have not been disclosed—an affidavit so expressed that the Court may know it is not a mere general a priori surmise as to classes of documents—but if the party is in a position to say on oath that he believes there is or are in his opponent's possession some specific

(1) 5 Q. B. D. 556.

document or documents which he can name and specify, in that case, those documents not having been disclosed, he is entitled to a further affidavit from his opponent as to those specific documents.

What then is the order made on the present application? It is that the plaintiff do file a further and better affidavit—(*a*)—as to letters from and copies of letters to the manufacturer of the goods in question. That clearly relates to a class of documents—a genus, not a species—and is certainly not specific. The next clause—(*b*)—would approach more nearly to something specific, if there were any averment that the particular documents mentioned—"the contract or contracts entered into by the plaintiff with the manufacturer of such goods"—had any existence. But I cannot find any affidavit that any document exists which evidences the contract. Clauses (*c*), (*d*), (*e*), (*f*) again refer to classes of documents.

The defendants are really asking for discovery of several large classes of documents, and according to the terms of the rule the affidavit in support of the application must state that, "in the belief of the deponent, the party against whom the application is made has or has at some time had in his possession or power the document or documents specified in the application, and that they relate to the matters in question." The documents must be "one or more specific documents to be specified in the application." Now, what is the affidavit in support of this application? First of all the deponent says that "to the best of his knowledge, information, and belief the plaintiff's affidavit does not disclose all the documents in the plaintiff's possession." Then he says: "Before litigation was thought of between my firm and the plaintiff it was known to me that the goods in question were manufactured for the plaintiff by a manufacturer whose name was not disclosed," and that the contract and correspondence with that manufacturer were material to the defence. But there is no averment that any written contract exists, and at present the presumption must be that it does not exist, because the plaintiff has not disclosed one, and he has by his affidavit sworn that he has disclosed every relevant document. Then again the third

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paragraph of the affidavit is not a statement of a specific document; it is only a statement that there was correspondence between the plaintiff and the manufacturer. [The Lord Justice read paragraph 4 of the affidavit and the first clause of paragraph 5, referring to "notes and memoranda in writing" made by Joseph White, and continued:—]

If that were the only subject-matter of this application, it is possible that it might be treated as more nearly specific, or if we were making a general order for further discovery we might throw that in. But if there is nothing else in the affidavit sufficiently specific, it would not, in my judgment, be right either for disposing fairly of the action, or in order to save the defendants the costs of the application, to require the plaintiff to give on oath a summary of what was stated in conversation between him and the deponent. Then the remainder of paragraph 5 refers to a class of documents, not a species. Paragraph 6 refers to matters not included in the registrar's order, and I need not deal with it. Paragraph 7 is undistinguishable from what would be asked for in a general discovery of documents. "There must be documents which relate to this matter, and I call on you to disclose them." That is not the mischief which was aimed at by this rule, as I have already pointed out. Then the deponent sets out two letters, from which it appears that he drew the attention of the plaintiff to the fact that books of correspondence with third parties, books of account, &c., were not disclosed, and the plaintiff answered to the effect that they were advisedly omitted from the affidavit, and he then goes on (and this is important, because it shews the ground of his belief) to argue that those things must exist. It is really an argumentative statement, not a statement that the documents do in fact exist. The same observation applies to paragraph 9, and it seems to me that if we were to allow this application we should be striking out of the rule the word "specific," which occurs several times in it; and really, if we were to do that it seems to me impossible to draw any logical line which would debar a person who simply had reason on à priori grounds to believe that a large mass of correspondence, books, entries, &c., connected with the subject-matter

had not been disclosed by the original affidavit from obtaining further discovery. There would be nothing to prevent a party from coming under this rule and saying, "Make a further affidavit of documents, because from my experience as a manufacturer I believe there must be in the nature of things other documents, and you must have carried on correspondence with other people relating to the matter in dispute between us which you ought to disclose." That is not the case to which the rule is addressed, and I do not see how we could affirm the learned judge's order without in fact striking the word "specific" out of the rule. I can quite understand why in this particular case the learned judge was prepared (especially as he was affirming the decision of the registrar), if the rule admitted of it, to order further discovery, because there are passages in the affidavit, and also in the correspondence between the parties, which do suggest that documents (which the deponent cannot specify as the rule requires) may exist which may be relevant to the matters in issue and which have not been disclosed. Although, therefore, I think that the appeal should be allowed, it should, I think, be allowed without prejudice to any application which the defendants may be advised to make for leave to interrogate the plaintiff.

STIRLING L.J. I am of the same opinion, and for the same reasons. I only desire to add this. I can see that difficulties may from time to time arise as to what are "specific" documents within the meaning of the rule. But in the present case it seems to me that, wherever the line may be drawn, the documents mentioned in the applicant's affidavit are not "specific." Even as regards the contracts, the applicant (as has been pointed out) fails to make out that they are in writing. I cannot help seeing that, if we were to sanction this order, a precedent would be established which would really result in striking out of the rule the word "specific," and the obligation which is thereby imposed on the applicant to specify the documents to which he refers. I entirely agree that the appeal should be allowed without prejudice to any application by the defendants for leave to interrogate the plaintiff, for I

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think some questions might be asked which might strengthen the defendants' position. That, however, must be the subject of a future application.

Appeal allowed.

Solicitors: *A. E. Fenton, for Mills & Needham, Manchester; Sims & Syms, for W. J. Andrew, Whaley Bridge.*

W. L. C.

1901
April 25; *May* 7.

ST. JAMES'S HALL COMPANY *v.* LONDON COUNTY COUNCIL.

Metropolis — Buildings — Theatres and Music Halls — Structural Defects causing Danger from Fire—Notice to Remedy—Compliance—Power to give subsequent Notice—Metropolis Management and Building Act, 1878 (41 & 42 *Vict. c.* 32), *s.* 11.

Where a notice has been served upon the owner of a building, under s. 11 of the Metropolis Management and Building Act, 1878, requiring him to remedy structural defects from which special danger from fire may result, and the requirements of that notice have been complied with, there is no power subsequently to serve another notice under that section in respect of the same building.

TRIAL of action before Channell J. without a jury.

The London County Council served upon the plaintiffs, under s. 11 of the Metropolis Management and Building Act, 1878, a notice requiring them to execute certain works at the St. James's Hall, which was a building within the provisions of s. 11. (1) The Metropolitan Board of Works, the predecessors

(1) 41 & 42 Vict. c. 32, s. 11: "Whenever it appears to the Board that any house or other place of public resort within the metropolis which was at the time of the passing of this Act authorized to be kept open for the public performance of stage plays, and which is kept open for such purpose, under the authority of letters patent from Her Majesty . . . . or of a licence granted by the Lord Chamberlain . . . . or by justices of the peace, or that any house, room, or other place of public resort within the metropolis, containing a superficial area for the accommodation of the public of not less than five hundred square feet, which was at the time of the passing of this Act authorized to be kept open, and which is kept open,

of the London County Council, in 1885 had served upon the plaintiffs a notice under s. 11 in respect of the same buildings, and the plaintiffs had complied with the requirements of that notice at a cost of about 7000*l.*

The plaintiffs contended that the powers conferred by s. 11 could only be exercised once, and that, therefore, the notice served by the London County Council was ultra vires, and they brought this action claiming a declaration to that effect, and an injunction restraining the defendants from acting upon the notice which they had given.

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for dancing, music, or other public entertainment of the like kind, under the authority of a licence granted by any court of quarter sessions, is so defective in its structure that special danger from fire may result to the public frequenting the same, then and in every such case the Board may, with the consent of the Lord Chamberlain in the case of theatres under his jurisdiction, and of Her Majesty's Principal Secretary of State in all other cases, if in the opinion of the Board such structural defects can be remedied at a moderate expenditure, by notice in writing require the owner of such house, room, or other place kept open for any of the purposes aforesaid, under such authority as aforesaid, to make such alterations therein or thereto as may be necessary to remedy such defects, within a reasonable time to be specified in such notice; and in case such owner fails to comply with the requirements of such notice within such reasonable time as aforesaid, he shall be liable to a penalty not exceeding fifty pounds for such default, and to a further penalty of five pounds for every day after the first day after the expiration of such reasonable time as aforesaid during which such default continues: Provided always, that any such owner may, within fourteen days after the receipt of any such notice as aforesaid, serve notice of appeal against the same upon the Board, and thereupon such appeal shall be referred to an arbitrator to be appointed by Her Majesty's First Commissioner of Works at the request of either party, who shall hear and determine the same, and may, on such evidence as he may think satisfactory, either confirm the notice served by the Board, or may confirm the same with such modifications as he may think proper, or refuse to confirm the same, and the decision of such arbitrator with respect to the requirements contained in any such notice, and the reasonableness of the same, and the persons by whom and the proportions in which the costs of such arbitration are to be paid, shall be final and conclusive and binding upon all parties.

"In case of an appeal against any such notice, compliance with the requirements of the same may be postponed until after the day upon which such appeal shall be decided as aforesaid, and the same, if confirmed in whole or in part, shall only take effect as and from such day."

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The further facts, and the arguments, sufficiently appear in the judgment.

Avory, K.C., and *Garland*, for the plaintiffs.
Dickens, K.C., and *Daldy*, for the defendants.

Cur. adv. vult.

May 7. CHANNELL J. read the following judgment:—This action, tried before me without a jury, was brought to obtain a decision upon the true interpretation of s. 11 of the Metropolis Management and Building Act, 1878, which section gave to the then Metropolitan Board (and now to the London County Council, their successors) certain powers for the prevention of danger from fire in music-halls which had been licensed for the first time prior to 1878. The Metropolitan Board exercised those powers in 1885, in reference to the St. James's Hall, and the plaintiff company, the owners of that hall, contend that the powers of the section must be exercised once for all. The defendants have served another notice purporting to be under the powers of the section, and the plaintiffs bring this action for a declaration that the notice is ultra vires and for an injunction.

The plaintiffs have obtained an interlocutory injunction restraining the defendants from acting upon the notice until the trial, and I have now to say whether the plaintiffs' view of the section is right. If it is, there is no dispute that the plaintiffs are entitled to the declaration, and, if they require it, to an injunction. The facts are that in 1885 the then Metropolitan Board, proposing to proceed under the section, prepared a draft notice of their requirements. This draft notice was the subject of negotiations between Mr. Walter Emden (who then, as now, was the architect of the plaintiffs) on the one hand, and the architect of the then Board on the other. The result was that modifications of what was at first proposed by the Board were agreed to, and those modifications were embodied in the formal notice which was served, dated August 10, 1885. The works in that notice were then done by the plaintiffs at a

cost, it is said, of upwards of 7000*l*. There was no appeal, as the works had already been agreed, but the result seems to me to be the same in substance as if there had been an appeal against the original proposal of the Board, and the award had been that the works which in fact were in the notice of August 10, 1885, should be done. At any rate, it is undisputed that there was an exercise of the compulsory powers of the section. The original proposal of the Board included the pulling down of an existing staircase, and the re-erection of a better staircase at the same place. The modifications agreed on included the pulling down of that staircase, but it was agreed it should not be re-erected, the necessary accommodation being provided elsewhere. One of the things which the county council now direct is the erection of a staircase at this same spot. I do not myself regard that fact as very important, but the change of view which has apparently taken place is an illustration of the mischief of holding that the powers of the section may be exercised from time to time whenever "it appears" to this fluctuating body that there is danger; and it certainly would be hard on the owner of the building if, as soon as he has complied with the requisition of the Board, he is liable to be ordered to pull down and alter that very work on change of views of the board or its architect. Since the works were completed in 1885, the plaintiff company have from time to time, at the suggestion of the county council, voluntarily made some alterations in such matters as the seats in the hall and otherwise, but they have done so without admitting the right of the defendants to require them to make those or other alterations, and it seems doubtful whether any of them were structural alterations. The London County Council now require, claiming the power to do so by this 11th section, further works, the cost of which is estimated at upwards of 4000*l*., and they have obtained (though without prejudice to the question now raised) the leave of the Secretary of State to make the requirement. Under these circumstances it becomes necessary carefully to examine the words of the section. There is nothing in the words used which is clearly inconsistent with the contention of either party. The word "whenever" seems

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to me to be as capable of meaning "at whatever time," which is the plaintiffs' contention, as it is of meaning "so often as," which is the defendants' contention, and it is necessary to look at the rest of the section and the context to see which of those two meanings it does bear. The first observation on the section is that it relates entirely to defects in structure, and not to defects arising from want of repair, or from the mode of control or management of the premises, such as keeping doors locked or the like. Further, it only gave power to the Board to require alterations which could be effected at a moderate expenditure. The result of that is that, if in 1878 there was a licensed music-hall which was so defective in its structure that special danger from fire arose, and the defects were such that they could not be remedied except at an excessive expenditure, no alteration could be required to be made in that music-hall, and, subject to any power the licensing authority might have to refuse to renew the licence, the hall must continue with its defects. That being so, it seems clear that the Metropolitan Board could not, in reference to such a hall, divide its requirements and make successive requirements, each of which could be complied with at a moderate expenditure, although the total would be excessive. That goes to shew that the powers of the section must be exercised once for all; otherwise, though the expenditure on each of successive requirements might be moderate, the total might be excessive. Again, when the 12th and 13th sections are looked at, it certainly seems that if a music-hall first licensed after 1878 complied with the regulations of the Board in force at the date it was completed, and got a certificate to that effect, it could not afterwards be interfered with. It is unlikely that the existing halls would be put on a worse footing than new halls in this respect; but to this argument it is answered that the old halls can only be interfered with when it appears to the Board that there is actual danger, and, further, that they are protected by the power of the Home Secretary to veto the requirement and by the right to require arbitration. These protections are, however, given in respect of the first exercise of the powers, and, therefore, they do not go far to shew that there cannot be a second exercise. Further, the condition

precedent is not that there should in fact actually be danger, but merely that there should "appear to the Board" to be danger, and it is these words that give rise to the question whether the Board can change their views. On the whole I have come to the conclusion that the plaintiffs are right in their contention. I think that the Board had only power to order alterations if such alterations not only could be done at a moderate cost, but also would when done remedy the defects. It must, therefore, be assumed that, when the works done in pursuance of the former order were completed, the defects were remedied, or, at all events, that in the opinion of the Board they were remedied. The Board could not in the next year have said that they themselves had made a mistake, and ought to have ordered something more or something different, and, if they could not, neither can the London County Council, who succeed to their rights. The word "whenever" is fully accounted for by its not being intended to compel the Metropolitan Board forthwith on the passing of the Act of 1878 to survey all existing music-halls. They were to exercise the powers given whenever they chose; but when they did exercise them their judgment was, in my opinion, to be, subject to the special mode of appeal provided in the section, final, not only as to the works ordered being required, but also as to those works being sufficient. I may point out that this view of the section is in accordance with what has been decided in analogous cases in other Acts of Parliament, namely, that a power to a local authority to order structural works (as, for instance, sewers) at the expense of a private owner must be exercised once for all: see *Bonella* v. *Twickenham Local Board* (1); *Hornsey Local Board* v. *Davis*. (2) I am, however, not prepared to hold that, if the owner of an old music-hall, after complying with a requisition under this section, were himself to make further structural alterations, and the effect of the alterations was to cause, in the opinion of the London County Council, danger from fire, they might not then act on this section. That question does not arise now. If the owners of a hall should ever do this, it would probably be held that the

(1) (1887) 20 Q. B. D. 63. (2) [1893] 1 Q. B. 756.

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hall as so altered was not the old hall which had been licensed prior to 1878, but a new hall coming under s. 12, and that it must comply with the existing regulations. If, however, that was not held, it would be in my opinion an open question whether s. 11 could not be applied to the case on the ground that, although the hall had not lost the protection given by s. 11, yet the powers of the Board had never been exercised in reference to the defects in question. That case differs entirely from the present. Here undoubtedly the Metropolitan Board did exercise in 1885 the powers of s. 11, and, if there are any defects now, they either existed prior to the order of 1885, and ought then to have been dealt with, or were occasioned by the works done in pursuance of that order. In either case the powers of s. 11 were, in my opinion, exhausted. I therefore think that the London County Council cannot now exercise the powers. There must be judgment for the plaintiffs. If any question arises as to the form of the judgment, I will hear the parties on it; otherwise there will be a declaration and injunction as asked for in the statement of claim.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Wilkinson, Howlett & Wilkinson.*
Solicitor for defendants: *W. Blaxland.*

P. B. H.

HUNTINGDON CORPORATION AND OTHERS *v.* HUNTINGDON COUNTY COUNCIL.

1901
May 18.

Local Government—Borough without Separate Commission of the Peace—Justices—Justices' Clerk—Power to Appoint—Payment of Salary—Fines and Fees payable to County Treasurer—Justices Clerks Act, 1877 (40 & 41 *Vict. c.* 43), *s.* 5—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 154–159.

Courts of petty sessions cannot be held for a borough without a separate commission of the peace except as courts for the petty sessional division in which the borough is situate.

A separate clerk cannot be appointed by the justices usually acting in a borough in which petty sessions are so held, but the justices of the petty sessional division may appoint a separate clerk in respect of each place appointed for holding petty sessions in the division, under s. 5 of the Justices Clerks Act, 1877.

The salary of every clerk so appointed is payable by the county council; and the unappropriated fines and fees must be paid to the county treasurer.

CASE stated by consent in an action.

The boroughs of Huntingdon, Godmanchester, and St. Ives, all in the county of Huntingdon, have each a population of less than 10,000. The two first named are very ancient boroughs; St. Ives was incorporated in 1874. All three boroughs are governed by the provisions of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50). Not one of these boroughs has a separate commission of the peace, and the jurisdiction of the quarter sessions of the county extends to all three. The county is divided into four petty sessional divisions. The boroughs of Huntingdon and Godmanchester are within the Leightonstone division, and the borough of St. Ives is within the Hurstingstone division. There is one salaried clerk to the justices for each of the Leightonstone and Hurstingstone petty sessional divisions, appointed by the justices acting in and for the division in which he is clerk, and his salary is paid by the county council.

The justices acting in and for the Leightonstone division hold the special and petty sessions for that division at the court-house in the county hall within the borough of Huntingdon,

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and at those sessions deal with all matters cognizable by a court of special or petty sessions arising within the division other than those arising within the boroughs of Huntingdon and Godmanchester. The justices acting in and for the Hurstingstone division hold the special and petty sessions for that division in the court-house within the borough of St. Ives, and at those sessions deal with all matters cognizable by a court of special or petty sessions arising within the division, other than those arising within the borough of St. Ives.

From the passing of the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), up to the present time petty sessional courts have been regularly held in the boroughs of Huntingdon (in the town-hall) and Godmanchester, and, since 1875, in the borough of St. Ives (in the court-house), but on days different from those on which the special and petty sessions for the Leightonstone and Hurstingstone divisions are held.

The mayor and ex-mayor of each borough, as justices for the borough by virtue of the provisions of s. 155 of the Municipal Corporations Act, 1882, and any county justices who choose to attend, form the petty sessional court for each borough respectively, and deal with all matters cognizable by a court of special or petty sessions arising within each borough respectively except licensing matters, in which the mayor and ex-mayor, unless themselves county justices, do not act.

Salaried clerks to perform the duties of clerk of special and petty sessions and of the justices acting in and for the respective boroughs have been appointed, as to Huntingdon and Godmanchester, since 1835 by the mayor and ex-mayor of each borough and the justices usually acting in each of the boroughs, and, as to St. Ives, in the case of the present clerk and his predecessor, by the county justices for the Hurstingstone division, the appointment of the present clerk being immediately after his appointment confirmed by the mayor and ex-mayor of the borough at the borough petty sessions. For the borough of Huntingdon the clerk is not, but for the borough of Godmanchester he is, the same person as the clerk for the Leightonstone division, and for the borough of St. Ives the clerk is the same

person as the clerk for the Hurstingstone division, separate salaries being paid in each case.

Up to the passing of the Local Government Act, 1888, the salaries of clerks so appointed for the boroughs were paid out of the borough fund of the respective boroughs, and the fines and fees imposed and taken at the special and petty sessions for the boroughs, which are unappropriated by statute, were paid to the treasurers of the respective boroughs and credited by them to the borough fund. After the passing of that Act, until May, 1899, the county council paid the salaries of the clerks so appointed for the boroughs, and all unappropriated fines and fees were paid over to the treasurer of the county.

After May, 1899, the auditor, in consequence of the decision in *Thetford Corporation* v. *Norfolk County Council* (1), objected to these salaries being paid by the county council, and the county council have thenceforth refused to pay these salaries, which have since been paid out of the respective borough funds; and the unappropriated fines and fees have, in the cases of Godmanchester and St. Ives, been paid into the borough funds of the respective boroughs, but, in the case of Huntingdon, have been paid to the county treasurer.

In June, 1900, the clerk of the county council applied for payment to the county treasurer of the unappropriated fines and fees in the borough courts, but the boroughs of Godmanchester and St. Ives have refused to pay the same to the county treasurer.

The questions for the opinion of the Court were :—

(1.) Are the mayor and ex-mayor of the respective boroughs of Huntingdon, Godmanchester, and St. Ives entitled to appoint a clerk to the justices of such boroughs, or to appoint a salaried clerk to perform the duties of clerk of special or petty sessions held in and for such boroughs?

(2.) If they are entitled to appoint a clerk to the justices of such boroughs, or a salaried clerk to perform the duties of clerk of special or petty sessions held in and for such boroughs, to whom should be paid all unappropriated fines or penalties and fees imposed and received by and in the special and petty

(1) [1898] 2 Q. B. 468.

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sessional courts held in and for such boroughs? Who is liable to pay the salary of such clerk and the expenses of and incidental to the holding of special and petty sessions in and for the said boroughs?

(3.) Are the mayor and ex-mayor of each of the said boroughs, in conjunction with the justices of the county usually acting for the division in which such borough is situated, or are the justices of the county usually acting for the division in which such borough is situated by themselves entitled, if it seem fit, to appoint a salaried clerk to perform solely the duties of clerk of special and petty sessions held in and for such borough and of the justices acting in and for such borough?

(4.) If such mayor and ex-mayor, in conjunction with such county justices, or if such county justices by themselves are entitled to appoint such salaried clerk, to whom should be paid all unappropriated fines or penalties and fees imposed and received by and in the special and petty sessional courts held in and for each of the said boroughs? Who is liable to pay the salary of such clerk and the expenses of and incidental to the holding of special and petty sessions in and for each of the said boroughs?

Asquith, K.C., and *W. W. Mackenzie*, for the plaintiffs. These questions depend upon the proper construction of several sections of the Municipal Corporations Act, 1882 (1), and the

(1) 45 & 46 Vict. c. 50, s. 154: "(1.) Where a borough has not a separate court of quarter sessions, the justices of the county in which the borough is situate shall exercise the jurisdiction of justices in and for the borough as fully as they can or ought in and for the county."

Sect. 155: "(1.) The mayor shall, by virtue of his office, be a justice for the borough, and shall, unless disqualified to be mayor, continue to be such a justice during the year next after he ceases to be mayor."

Sect. 156: "It shall be lawful for the Queen, on the petition of the council of a borough, to grant to the borough a separate commission of the peace."

Sect. 157: "(1.) It shall be lawful for the Queen, from time to time, to assign to any persons Her Majesty's commission to act as justices in and for each borough having a separate commission of the peace."

Sect. 158: "(1.) A justice for a borough shall, with respect to offences committed and matters arising within the borough, have the same jurisdiction and authority as a justice for a county has under any local or general Act with respect to offences com-

Local Government Act, 1888 (1), and of the Justices Clerks Act, 1877. (2) The question arises upon the Municipal Corporations Act, 1882, whether ss. 158 and 159 apply to boroughs which have not a separate commission of the peace. If they do, then the power of the justices for the borough to appoint a clerk is clear. Now s. 154 confers jurisdiction upon justices of the county to act as justices in and for a borough without a separate commission of the peace, and s. 158 defines that jurisdiction, and is not limited in terms to boroughs with a separate commission. Therefore, there is no reason why s. 159 should be construed to apply only to boroughs with a separate commission, for it is not one of a group of sections dealing exclusively with such boroughs. Sect. 159 is substituted for s. 102 of the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), in which the power to appoint a justices' clerk was expressly limited to boroughs with a separate commission; that limitation is omitted, presumably intentionally, in the present Act. Therefore the mayor and ex-mayor, together

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mitted and matters arising within the county. . . ."

Sect. 159: "(1.) The justices for a borough shall from time to time appoint a fit person to be their clerk, to be removable at their pleasure."

(1) 51 & 52 Vict. c. 41, s. 84: "(1.) The salaried clerk of every petty sessional division shall be from time to time appointed, and removed, as heretofore.

"(2.) The county council shall pay to the salaried clerks of petty sessional divisions such salaries as may be fixed under the enactments relating to those clerks, and all fees and costs payable to such clerks which are not excluded in the fixing of their salaries shall be paid into the county fund."

(2) 40 & 41 Vict. c. 43, s. 5: "In each petty sessional division there shall . . . . be only one salaried clerk in the division to perform the duties of clerk of petty sessions, clerk of special sessions, or clerk of any justice or justices of the peace:

"Provided that—

"(1.) Where special or petty sessions are usually held at more than one place appointed for the purpose in a petty sessional division, there may, if it seem fit, be a separate salaried clerk appointed in respect of each such place."

"(4.) A Secretary of State, on the application of the local authority, may, if he thinks fit, authorize in any case the appointment of more than one salaried clerk.

"The salaried clerk . . . . shall be appointed from time to time by the justices acting in and for the petty sessional division in which he is clerk assembled in special sessions, and shall hold his office during the pleasure of those justices."

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with the county justices acting in and for the borough, have power to appoint a clerk.

The proper conclusion from the Acts is that whoever appoints the clerk should pay the salary, and that the fines and fees should be paid to those who pay the salary.

If the appointment of clerk rests with the county justices only, they have power under s. 5, sub-s. 1, of the Justices Clerks Act, 1877, to appoint more than one clerk where petty sessions are held at more than one place in the division—that is, for the boroughs of Huntingdon and Godmanchester, though not for St. Ives, and even for the borough of St. Ives with the consent of the Secretary of State under s. 5, sub-s. 4.

The case upon which the auditor acted, *Thetford Corporation* v. *Norfolk County Council* (1), has no bearing whatever upon the present case, for Thetford was a borough with quarter sessions and a separate commission of the peace.

C. A. Russell, K.C., and *Brooke Little*, for the defendants. It cannot properly be said that the clerks of these boroughs were in any sense the clerks for the petty sessional divisions, or that they were appointed as clerks under s. 5, sub-s. 1, of the Justices Clerks Act, 1877. These borough clerks cannot have been lawfully appointed unless s. 159 of the Municipal Corporations Act, 1882, applies to cases of this kind. They cannot be appointed under s. 5, sub-s. 1, of the Act of 1877, except by the county justices at special sessions, if petty sessions are held at more than one place within the division. The appointments of these clerks have not been made in that way, and in the case of St. Ives could not be so made, for petty sessions are not held at more than one place in that division. Sects. 155–159 of the Act of 1882 apply only to boroughs with a separate commission of the peace; it is clear that s. 158 is limited to those boroughs, for a borough without a separate commission is part of the county petty sessional division. Therefore s. 159 is one of a group of sections dealing only with boroughs with a separate commission, and must be construed as being so limited. In *Reigate Corporation* v. *Hart* (2) it was held that, under s. 57 of the Act of 1835, which corresponds

(1) [1898] 2 Q. B. 468. (2) (1868) L. R. 3 Q. B. 244.

to s. 155 of the Act of 1882, the mayor and ex-mayor of a borough without a separate commission acted as *county* justices. That case also decides that the fines and fees must be paid to the county treasurer. These clerks not having been legally appointed, the county council cannot be under any liability to pay their salaries. With regard to the mayors, they are full county justices by virtue of ss. 21 and 22 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), but the ex-mayors are not.

Asquith, *K.C.*, in reply. After the discussion, the plaintiffs cannot now contend that s. 159 of the Act of 1882 applies to a borough which has not a separate commission of the peace. Sect. 5, sub-s. 1, of the Act of 1877 does apply, and a second clerk can be appointed for Huntingdon and Godmanchester.

KENNEDY J. The questions submitted to us in this case are four in number. To the first question the answer is that the mayor and ex-mayor are not entitled to appoint a clerk because, in my opinion, s. 159 of the Municipal Corporations Act, 1882, has no application except in the case of boroughs with a separate commission of the peace. With regard to the second question, it does not arise after the answer to the first. As to the third question, in my opinion the power of appointment rests with the justices of the county usually acting for the petty sessional division. As regards those justices, who are the justices of the petty sessional division, they may appoint a second clerk for the division if the appointment is within the power given by s. 5 of the Justices Clerks Act, 1877, but not otherwise. The answer, therefore, to the third question as stated is, No. The justices cannot appoint a clerk to perform duties solely for matters arising within the borough; but if the case is within s. 5 of the Justices Clerks Act, 1877, they can appoint as prescribed by that section a second clerk for the whole of the petty sessional division, if special or petty sessions are usually held at more than one place within the division. Further, with regard to the "places," they may be two places both within the borough, and not necessarily one outside and the other within the borough. That is a matter for

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the determination of the justices of the petty sessional division. The fourth question does not arise after the negative answer has been given to the third. We can, however, say that the moneys there referred to should be paid, as the county justices are alone entitled to appoint the clerk, to the county treasurer, and that the question as to payment of the salary of the clerk is determined by s. 84, sub-s. 2, of the Local Government Act, 1888, which provides that "the county council shall pay to the salaried clerks of petty sessional divisions such salaries as may be fixed under the enactments relating to those clerks." That provision applies whether one clerk only is appointed or whether a second clerk is appointed under the power given by s. 5 of the Justices Clerks Act, 1877.

PHILLIMORE J. I agree, and will only add that, when we say that the mayor has no power to appoint, we only mean that he has no power as mayor of the borough, though as a county justice, by virtue of s. 22 of the Local Government Act, 1894, he has power together with the other county justices.

Judgment accordingly.

Solicitors for plaintiffs: *Grubbe & Troughton, for Hunnybun & Sons, Huntingdon, and for G. Dennis Day, St. Ives.*

Solicitors for defendants: *Peacock & Goddard, for J. P. Maule, Huntingdon.*

P. B. H.

ROBERTSON *v.* KING.

1901
April 23.

Local Government — Local Authority — Powers — Dwelling-house unfit for Human Habitation — Closing Order — Housing of the Working Classes Act, 1890 (53 & 54 *Vict. c.* 70), *ss.* 29, 32.

By s. 32, sub-s. 1, of the Housing of the Working Classes Act, 1890, it is the duty of a local authority to take proceedings against the owner or occupier for the closing of a dwelling-house which is unfit for human habitation; and by sub-s. 2, "any such proceedings may be taken for the express purpose of causing the dwelling-house to be closed whether the same be occupied or not." By s. 29, "In this part of the Act, unless the context otherwise requires, the expression 'dwelling-house' means any inhabited building. . . ."

A local authority applied for a closing order in respect of three dwelling-houses which were admittedly unfit for human habitation. The houses had been closed by the owner for five and a half years for all purposes of human habitation, and they had not been used for such purposes during that period, nor had the owner any intention of allowing them to be so used in their present condition. A magistrate having refused to make a closing order:—

Held, that the definition of "dwelling-house" in s. 29 did not operate to curtail the powers of the local authority under s. 32; that the mere fact of non-occupancy was not in itself an objection to the making of a closing order, and that the magistrate was wrong.

CASE stated by the stipendiary magistrate for Sheffield, which was in substance as follows:—

The appellant, who was the medical officer of health for the city of Sheffield, had applied under s. 32 of the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), for a closing order in respect of three dwelling-houses of which the respondent was the owner, on the ground that they were used as dwelling-houses and were in a state so injurious to health as to be unfit for human habitation, and the respondent had been summoned to answer the appellant's complaint. At the hearing it appeared that the premises, which were described in the complaint as three dwelling-houses situate in a corner of a court in Sheffield and as being used as dwelling-houses, were old buildings with their appurtenances, and that for a long period after they were built they had been occupied or inhabited

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and had been dwelling-houses within the meaning of Part II. of the Act. It was proved and admitted that in their present condition they were unfit for human habitation within the meaning of the Act, inasmuch as they were in a dirty, ruinous, and dilapidated state, and that there were filthy and other accumulations upon them which might probably be a nuisance as to which proceedings might be taken under the Public Health Act, 1875. It appeared, however, that about five and a half years previously the premises had been closed to all purposes of human habitation by the then owner, and had not since then been used or reopened for such purposes. Evidence was called that during the five and a half years the premises had never been used for purposes of human habitation except possibly by a chance person creeping in for a sleep, though this had never been known to happen. It further appeared that the respondent had no intention of having the premises used for human habitation in their present condition; but it did not appear whether he had formed any intention as to rebuilding or repairing them or turning them to other purposes.

The learned magistrate refused to make a closing order. He was of opinion that, as the premises had been so long closed to human habitation and placed in a position in which a closing order would place them, whatever nuisance proceedings the respondent might be liable to, there was a want of foundation for a closing order, though he thought that if the owner had caused or allowed them to be reopened for purposes of human habitation a closing order might be made, whether they were occupied or not.

The following grounds of objection to the refusal of the magistrate to make a closing order were handed to him: "The corporation contend that the premises the subject of the proceedings in this case are dwelling-houses within the meaning of the Housing of the Working Classes Act, 1890; that s. 29, which defines a dwelling-house as any inhabited building, provides that such definition shall apply 'unless the context otherwise requires'; that under s. 32, sub-s. 2, the context otherwise requires and provides that the provisions of s. 32 shall apply whether the premises be occupied or not; that in

the present case the buildings are inhabited dwelling-houses, and that there is no evidence of permanent abandonment of the buildings as dwelling-houses, inasmuch as the evidence shews that they have not been adapted for any other purpose, and might at small cost and in the course of a day or two be made fit for human habitation."

The question for the opinion of the Court was whether the closing order should have been refused or granted.

Reginald Brown, K.C., for the appellant. The magistrate was wrong. It is no answer to the application for a closing order that a house has not in fact been occupied for five years. The definition of "dwelling-house" in s. 29 as "any inhabited building" does not operate to restrict the right of a local authority under s. 32 to obtain a closing order, for by sub-s. 2 such an order may be obtained whether the dwelling-house be occupied or not.

The respondent did not appear.

LORD ALVERSTONE C.J. I think that in this case the magistrate ought to have made the closing order asked for. The object of the section can be carried into effect without straining the meaning of the language used. The meaning is that power is given to make a closing order if the owner, upon notice given to him, does not put the premises into a proper condition. As I understand the contention made before the magistrate on behalf of the owner, it was that, because for five and a half years the premises had not in fact been occupied, they were therefore not inhabited within the meaning of s. 29 of the Housing of the Working Classes Act, 1890. But that section is not intended to negative the provisions of ss. 32 and 33, and it is clear, in my opinion, that the mere fact of non-occupancy is not in itself an objection in point of law to the making of a closing order. It is not necessary to consider what length of non-occupancy would be sufficient to prevent a house being looked upon as an inhabited house within the section. In my opinion, these premises are primâ facie dwelling-houses, and I do not think it necessary to limit

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the language of the section to inhabited dwelling-houses. Certainly no harm can be done by the making of an order, for if the owner does not want the premises pulled down, he can make them fit for human habitation. The appeal must be allowed.

LAWRANCE J. I agree.

Appeal allowed.

Solicitors for appellant: *R. F. C. & C. L. Smith, for Sayer, Sheffield.*

W. J. B.

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April 23.

THE KING *v.* THE NORFOLK COUNTY COUNCIL.

Local Government—District Council—Public Right of Way—Removal of Obstruction by Private Individual—Action by Landowner—Power of District Council to contribute to Costs of Defence—Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *s.* 26.

By s. 26, sub-s. 1, of the Local Government Act, 1894, it is the duty of every district council to protect all public rights of way, and to prevent as far as possible the stopping or obstruction of any such right of way; and by sub-s. 3 a district council may, for the purpose of carrying the section into effect, institute or defend any legal proceedings, and generally take such steps as they deem expedient:—

Held, that a district council might, under the powers conferred by the section, contribute to the costs of the defence of an action brought against a private individual who had removed an obstruction in the assertion of an alleged public right of way.

ARGUMENT of a rule nisi calling upon the Norfolk County Council to shew cause why a writ of certiorari should not issue to remove into the High Court an order or resolution of the county council for the purpose of its being quashed.

It appeared from the affidavits that a dispute had arisen as to the existence of a public right of way across certain land in the parish of Snettisham belonging to Sir Edward Green, of which his son, Mr. Lycett Green, was the tenant, and that two persons, named Ellis and French, in the assertion of the alleged public right of way, had removed an obstruction placed across the path in question. An action had then been brought against Ellis and French in the Chancery Division by Sir Edward

Green and his son, in which they claimed a declaration that there was no public right of way across the land. After the issue of the writ the parish council of Snettisham presented a petition under s. 26 of the Local Government Act, 1894, to the district council of Docking, praying them to undertake the defence to the action, but the district council refused to comply with the request. Thereupon the parish council, acting under s. 26, sub-s. 4, appealed to the Norfolk County Council, praying them to undertake the defence to the action in place of the district council; and on October 13, 1900, the county council passed the following resolution: "That the powers and duties of the Docking Rural District Council under s. 26 of the Local Government Act, 1894, in respect of the alleged unlawful obstruction of a public right of way along the Ken Hill foot-path in the parish of Snettisham, be transferred to the county council, and that the county council do contribute towards the defendants' costs of the action pending in the Chancery Division." Certain terms or conditions, which it is unnecessary to particularise, as to the conduct of the defence, taxation of costs, &c., were appended to the resolution. The present rule for a certiorari was then obtained on behalf of Sir E. Green and Mr. Lycett Green. (1)

(1) By 56 & 57 Vict. c. 73 (The Local Government Act, 1894), s. 26, sub-s. 1, "It shall be the duty of every district council to protect all public rights of way, and to prevent as far as possible the stopping or obstruction of any such right of way, ... where the stoppage or obstruction thereof would in their opinion be prejudicial to the interests of their district, and to prevent any unlawful encroachment on any roadside waste within their district."

By sub-s. 2, "A district council may with the consent of the county council for the county within which any common land is situate aid persons in maintaining rights of common where, in the opinion of the council, the extinction of such rights would be prejudicial to the inhabitants of the district. . . ."

By sub-s. 3, "A district council may, for the purpose of carrying into effect this section, institute or defend any legal proceedings, and generally take such steps as they deem expedient."

By sub-s. 4, if a district council refuses or fails to take proceedings upon a representation from a parish council that a public right of way has been unlawfully stopped or obstructed, the parish council may petition the county council, "and if that council so resolve the powers and duties of the district council under this section shall be transferred to the county council."

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C. A. Russell, K.C. (*Fleetwood Pritchard* with him), for the Norfolk County Council, shewed cause. The resolution was valid. The case is not affected by the law of maintenance, for private persons can individually contribute towards the costs of an action brought to maintain a public right of way without bringing themselves under the operation of that law, and the county council is a body representing the public who wish to establish a right of way. The effect of s. 26, sub-s. 1, is to cast upon the district council the positive duty of protecting public rights of way and preventing their obstruction, and the scope of sub-s. 3, which gives the power to institute or defend legal proceedings, must be interpreted by reference to the duties imposed by sub-s. 1. The county council cannot in the present case perform the statutory duty cast upon them otherwise than by defending the action. Secondly, the county council is not a judicial body, and in the absence of express statutory authority the Court has no power to bring up this resolution by a writ of certiorari for the purpose of quashing it. The remedy by certiorari given by s. 80, sub-s. 2, of the Local Government Act, 1888, only applies to proceedings of a certain class, that is, payments out of the county fund, and the fact that money may some day have to be paid in pursuance of this resolution does not bring the case within the purview of that sub-section. (1)

Rawlinson, K.C. (*Gurdon* with him), for the defendants in the action, also shewed cause.

McCall, K.C., and *F. K. North*, for the plaintiffs, in support of the rule. The effect of the resolution is that the county council are not parties to the action, and cannot be made responsible for the plaintiffs' costs, and there is nothing in s. 26 which authorizes them to spend the money of the ratepayers in aiding a defendant who may be a man of straw, and thus inflict great hardship upon the plaintiffs. The language of sub-s. 1, which authorizes a district council to protect public rights of way, points to their doing so by means of an action or an indictment, or by pulling down the obstruction; and this is

(1) It was eventually agreed that the resolution of the county council should be treated as an order for the payment of money, and no judgment was given upon this point.

the interpretation placed upon it by the Local Government Board: see Macmorran and Dill's Local Government Act, 1894, p. 584. The council may take legal proceedings, or may defend legal proceedings brought against them, or possibly against their surveyor; but the section does not enable them to assist private individuals in asserting the existence of a public right of way, the assertion and maintenance of which are matters directly within the province of the council, and in respect of which they ought to take proceedings. Sub-s. 2, which deals with disputes as to common land, marks the difference between such disputes and disputes as to rights of way by giving express power to district councils to aid persons in maintaining rights of common where their extinction would be prejudicial to the inhabitants; no such power is given in terms in the case of public rights of way. Sub-s. 3 gives express power to institute or defend legal proceedings, but the general power to "take such steps as they deem expedient" does not authorize the payment of the costs of a private individual; the general words, which would cover the removal of an obstruction, were probably inserted to provide the machinery for executing the various duties imposed by sub-s. 2. The proper course for the county council to adopt was to bring an action against the landowner, or to become defendants in an action.

C. A. Russell, K.C., in reply.

LORD ALVERSTONE C.J. This case is not altogether free from doubt, but in my opinion we ought not to make this rule absolute. Sect. 26, sub-s. 1, of the Act imposes upon every district council the duty of protecting all public rights of way, and preventing as far as possible the stopping or obstruction of any such right. Sub-s. 3, to which I pass for the moment, provides that "a district council may, for the purpose of carrying into effect this section, institute or defend any legal proceedings, and generally take such steps as they deem expedient." It is possible to construe these words as confined to the institution by a district council of any legal proceeding in their own name, or the defence of any legal proceeding brought against them; but, though a possible, it would I think be too

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narrow a construction. In the first place, there are many proceedings which may be instituted on behalf of public bodies, but which have to be taken in the name of the Attorney-General, and with regard to defences there would seem to be many cases in which it is at least as probable that the action may be brought against a private individual or against a servant of the district council as against the district council themselves. During the argument I put to the counsel for the plaintiffs the particular case that arose out of his argument, which is in substance to this effect: assuming that the district council authorize their surveyor to pull down the obstruction, and the plaintiff brings an action against the surveyor, whether or not in that case the district council could defend the proceedings or take the steps they might deem expedient for the defence. At first the learned counsel was inclined to answer that that was a case where the district council possibly might defend the action; but seeing the danger of that admission, he finally said that it was not a case which was likely to arise and he did not wish to make any admission; nor indeed was he bound to do so. I think that the district council in the discharge of their duty to prevent an obstruction might defend the legal proceedings brought against their surveyor.

The next step brings us to the state of affairs in the present case. Before the district council are assumed to have interfered at all, an action is brought against two persons who may have been put up to pull down the obstruction or who may not. It is said that we are to assume that these two particular defendants would not be able, if unsuccessful, to pay the plaintiffs' costs. We know nothing about that. It is quite possible that the plaintiffs might not have what I may call security for their costs; but, as I have pointed out, they have brought the action against the persons who have in fact removed the obstruction, and there is nothing in the Act that gives to these particular plaintiffs the benefit of any security for costs to be given by the defendant. Assuming that the district council had been minded to take up the defence to the action brought against the two defendants, I think that under sub-ss. 1 and 3 they could have done so.

If this view is right, it almost decides the question, except so far as regards any argument that may be founded on the different language of sub-s. 4. It is quite true that when sub-s. 4 is looked at, it is apparent that the draftsman has not followed exactly the language previously used in the section; for instance, the sub-section does not use the words "steps" or "defence," but simply makes it the duty of the district council to "take proper proceedings accordingly," and on their refusal or failure to take any proceedings, "the parish council may petition the county council for the county within which the way or waste is situate, and if that council so resolve the powers and duties of the district council under this section shall be transferred to the county council." In the present case I do not think that the intention of the section enables us to draw any conclusion founded on the exact language used in one sub-section and that used in another. I think that in a proper case on the petition of the parish council the county council can acquire and exercise all the powers and duties of the district council; and having regard to what I have already said when considering sub-ss. 1 and 3, I think that the county council could defend an action brought against the surveyor of the other authority, or could defend an action brought against private individuals, if they thought it a proper action to be defended. It is contended that, contrasting the language of sub-s. 4 with that of sub-s. 2, a permissive power is expressly given to aid people in maintaining rights of common, the exercise of which power would lead to possible contribution by the county council. That may be so; but I think it would be dangerous to allow that fact to affect the interpretation of this section. The section, as is common in modern Acts of Parliament, contains many sub-sections, and finding, as I do, that by sub-ss. 1, 3, 4, and 5 a general duty is imposed in the first place upon the district council and then upon the county council on their default to protect public rights of way and to defend proceedings taken in respect of them, I think we ought not to limit those powers in the manner suggested, because in respect of rights of common the council are in express terms clothed with a permissive duty (if I may use the expression) to assist

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private individuals. The case is not free from difficulty, but upon the whole it is not sufficiently clear to enable us to make this rule absolute.

LAWRANCE J. I agree.

Rule discharged.

Solicitors for county council: *Sharpe, Parker, Pritchards, Barham & Lawford, for Charles Foster, Norwich.*

Solicitors for defendants in action: *Church, Rendell, Todd & Co., for J. A. Parsons, Lynn.*

Solicitors for plaintiffs in action: *Burton, Yeates & Hart, for Beloe & Beloe, Lynn.*

W. J. B.

1901
May 2.

BROADBENT, APPELLANT *v.* SHEPHERD, RESPONDENT.

Local Government—Nuisance—Abatement—Owner—Default—Jurisdiction of Justices to make Order on Person who has ceased to be Owner—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 94, 95, 96, 98, 104.

A local authority took proceedings under the Public Health Act, 1875, against the agent of the owner of certain property for the abatement of a nuisance. The justices held that the respondent was not the owner within the meaning of the Act, and dismissed the summons. Their decision was reversed by the Divisional Court and the case remitted to them. At the second hearing it appeared that the respondent had resigned the agency since the first hearing, and the justices again dismissed the summons:—

Held, that the justices had jurisdiction to make an order on the respondent requiring him to abate the nuisance, although he was no longer the agent of the owner of the property.

CASE stated by justices.

On June 27, 1900, a complaint was preferred at the Castleford Petty Sessions by the appellant Broadbent on behalf of the Castleford Urban District Council against the respondent Shepherd, who was agent for a Mr. Donkersley, the owner of certain houses within the district, under s. 95 of the Public Health Act, 1875, requiring him to abate a certain nuisance on the premises.

The justices dismissed the complaint on the ground that the

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respondent was not the owner of the premises within the meaning of the section, but stated a case for the opinion of the Court.

On November 15, 1900, a Divisional Court, consisting of Lord Alverstone C.J. and Kennedy J., reversed the decision of the justices, and remitted the matter to them with the opinion that an agent was an owner of the premises for the purpose of s. 94 of the Act.

On December 25 the case was reinstated at the Castleford Petty Sessions, and it was then admitted that the respondent was no longer agent or rent-collector for the property in question, having resigned his agency since the last hearing; and it was also admitted that the actual owners of the property had recently been served with notice to abate the nuisance, and that they had actually commenced and carried through part of the work. The appellant, however, proved that part of the premises were still in a state dangerous to the lives of the tenants, and urged the justices to make an order on the respondent ordering him to abate the nuisance complained of. The justices held that they had no power under the circumstances to make such an order on the respondent; and they accordingly dismissed the summons, but stated this case for the opinion of the Court. (1)

(1) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4, "In this Act, if not inconsistent with the context, the following words and expressions have the meanings hereinafter respectively assigned to them—that is to say . . . .

"'Owner' means the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent."

By s. 94, "On the receipt of any information respecting the existence of a nuisance, the local authority shall, if satisfied of the existence of a nuisance, serve a notice . . . . on the owner or occupier of the premises on which the nuisance arises requiring him to abate the same. . . ."

By s. 95, "If the person on whom a notice to abate a nuisance has been served makes default in complying with any of the requisitions thereof, ... the local authority shall cause a complaint relating to such nuisance to be made before a justice, and such justice shall thereupon issue a summons requiring the person on whom the notice was served to appear before a court of summary jurisdiction."

By s. 96, "If the Court is satisfied that the alleged nuisance exists . . . . the Court shall make an order on such

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Macmorran, K.C. (*Scholefield* with him), for the appellant. The justices were wrong. They had jurisdiction to make the order against the respondent, even although he had ceased to be agent for the property at the second hearing of the case. Even though an "owner" cannot enter on the premises without the permission of the occupier, the order may be made against him: *Parker* v. *Inge*. (1) In that case the decisions which seemed to the contrary effect—*Mayor of Scarborough* v. *Rural Sanitary Authority of Scarborough* (2) and *Reg.* v. *Trimble* (3)—were cited, and Cave J. said that he could not understand them. Those cases are, however, distinguishable, as here, at the time the order ought to have been made, the respondent was the owner. Until the order is made and disobeyed, the local authority cannot enter on the premises and do the work themselves. There is no hardship in making the order, since s. 104 gives the local authority power in such a case to recover the costs and expenses from the owner for the time being of the premises.

The respondent did not appear.

LORD ALVERSTONE C.J. This case came originally before my brother Kennedy and myself in November last. We then held that the justices ought to have made the order on the respondent on the ground that he was the owner of the premises within the definition contained in s. 4 of the Public

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person requiring him to comply with all or any of the requisitions of the notice. . . ."

By s. 98, "Any person not obeying an order to comply with the requisitions of the local authority or otherwise to abate the nuisance shall . . . . be liable to a penalty . . . .; moreover, the local authority may enter the premises to which any order relates and abate the nuisance, and do whatever may be necessary in execution of such order, and recover in a summary manner the expenses incurred by them from the person on whom the order is made."

By s. 104, "All reasonable costs and expenses incurred in making a complaint, or giving notice, or in obtaining any order of the Court or any justice in relation to a nuisance under this Act, or in carrying the same into effect, shall be deemed to be money paid for the use and at the request of the person on whom the order is made . . . . and in case of nuisances caused by the act or default of the owner of premises, such costs and expenses may be recovered from any person who is for the time being owner of such premises. . . ."

(1) (1886) 17 Q. B. D. 584.

(2) (1876) 1 Ex. D. 344.

(3) (1877) 36 L. T. 508.

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Health Act, 1875. For the purposes of the present case, we must assume that the order which the justices would have made would have been an order for the abatement of the nuisance within a certain number of days. At some time after the first hearing of the case by the justices, the respondent, who was then the agent for the owner of the property, has ceased to be agent. If the sole object of the application against him were a personal remedy against the individual either by fine or by the imposition of a personal responsibility, different considerations would arise, and it might be said that the Court ought not to make an order which would in effect be useless. I desire, however, to express no opinion on this point. But when ss. 96 and 98 are considered, it is plain that the order of the justices to abate the nuisance is the foundation of the right of the local authority to enter upon the premises and do the work themselves, and recover the expenses from the person who is responsible. Therefore, as I think that the justices had originally jurisdiction to make the order against the respondent as owner within the meaning of the sections, I think that when the case was remitted to them by my brother Kennedy and myself they ought to have made the order which they should have made in the first instance if they had taken a correct view of the Act—that is to say, an order on the respondent to abate the nuisance. That order being disobeyed, the local authority have power under s. 98 to enter upon the premises and do whatever may be necessary in execution of the order, and then by s. 104 there is power to recover the costs and expenses from the owner for the time being of the premises.

I therefore think that the justices ought to have made this order upon the respondent, notwithstanding that he had ceased to be the agent for the property when the case was actually determined. The case must be remitted to the magistrates with this expression of our opinion.

LAWRANCE J. concurred.

Case remitted.

Solicitors for appellant: *G. T. B. S. Thurnell, for Kemp, Castleford.*

A. P. P. K.

1901
May 4.

CORBETT, APPELLANT *v.* BADGER, RESPONDENT.

Local Government—London—Fees of District Surveyor—Liability of Builder, Owner, or Occupier—Period of Limitation—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 154, 157—*Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 11.

By s. 157 of the London Building Act, 1894, it is enacted that at the expiration of fourteen days after the roof of any building surveyed by a district surveyor has been covered in he shall be entitled to receive the fees due to him from the builder or from the owner or occupier of the building, and if any such builder, owner, or occupier refuses to pay the fees, they may be recovered in a summary manner on its being shewn to the satisfaction of the Court that a proper bill specifying the amount of the fees was delivered to him:—

Held, that the period of limitation fixed in such a case for taking proceedings by s. 11 of the Summary Jurisdiction Act, 1848, does not begin to run until the bill has been delivered to the party from whom the fees are sought to be recovered in a summary manner.

CASE stated by a metropolitan magistrate.

Eight summonses were issued, on complaints made on November 8, 1900, by the respondent Badger, to recover fees amounting to 546*l.* 7*s.* 6*d.*, alleged to be due to him as district surveyor for the district of Lewisham under the London Building Act, 1894.

The following facts were proved or admitted at the hearing.

The appellant Corbett was the owner of certain lands situate at Hither Green, in the district of Lewisham, and known as the St. German's estate, and the respondent was the district surveyor for the district under the London Building Act, 1894. It was admitted that at all material times the appellant was the owner of the buildings placed on the said land for the purposes of ss. 154 and 157 of that Act.

In the year 1899 the appellant contracted with a builder named Lawrence to erect certain houses on part of the said land. Lawrence erected the houses, and was paid by the appellant the sums for which he contracted to erect the said houses. Such sums included any fees which Lawrence was liable to pay to the respondent under the London Building Act, 1894. By s. 154 of that Act it is provided that there

shall be paid by the builder, or in his default by the owner or occupier, as the case may be, of the building or structure in respect whereof the same are chargeable, to every district surveyor in respect of the several matters mentioned in Parts I. and III. of the 3rd schedule to the Act, the fees therein specified, and by s. 157 of the Act it is enacted that—"(1.) At the expiration of the following periods, that is to say, (*a*) of 14 days after the roof of any building surveyed by a district surveyor under this Act has been covered in . . . . the district surveyor shall be entitled to receive the fees due to him from the builder employed in erecting such building . . . . or from the owner or occupier of the building . . . . so erected . . . . (2.) If any such builder, owner, or occupier refuses to pay the said fees, they may be recovered in a summary manner on its being shewn to the satisfaction of the Court that a proper bill specifying the amount of the fees was delivered to him or sent to him in a registered letter addressed to his last known residence." The amounts claimed by the respondent were fees to which he was entitled under Part I. of the 3rd schedule to the Act.

The roofs of the houses in respect of which the summonses were issued had been covered in before the end of December, 1899, and the respondent delivered to Lawrence proper bills specifying the amount of the fees to which the respondent was entitled in respect of those houses, and demanded them from Lawrence at various times between January 17, 1900, and September 10, 1900.

On several occasions subsequent to the delivery of the bills to Lawrence the respondent requested payment of the fees from Lawrence, but Lawrence did not pay any part thereof, although frequently promising to do so; and on July 2, 1900, he sent the respondent notice that he was insolvent.

On October 20, 1900, the respondent delivered to the appellant proper bills specifying the amount of the fees, and demanded payment thereof from the appellant.

It was contended for the appellant that the fees became payable by the appellant, if at all, immediately upon Lawrence making default in payment, and that Lawrence had made default in payment in January, 1900, and that therefore the

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respondent's complaints were not laid within six calendar months from the time when the respondent became entitled to receive the fees, and were therefore not laid within the time limited for the commencement of summary proceedings by s. 11 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43).

It was contended for the respondent that his complaints were laid within six months of the time when proper bills specifying the amount of the fees were delivered to the appellant, and that the date upon which the bills were delivered to the appellant was the time from which the six months limited by s. 11 began to run. The magistrate upheld the contentions of the respondent, and ordered the appellant to pay the amount claimed, but stated this case for the opinion of the Court. (1)

Macmorran, K.C. (*Cunningham Glen* with him), for the appellant. The magistrate was wrong. The complaints were out of time. The period of limitation began to run from fourteen days after the roof of the buildings had been covered in, and the fact that by sub-s. 2 of s. 157 of the London Building Act, 1894, the fees cannot be recovered in a summary manner until it is proved that a bill specifying the amount has been delivered cannot operate to extend the time. The magistrate held that the case was governed by the decision in *Labalmondiere* v. *Addison* (2); but in *Pool and Forden Highway Board* v. *Gunning* (3) Field J. points out that *Labalmondiere* v. *Addison* (2) proceeded on the peculiar character of the subject-matter of the case.

A statute ought not so to be construed as to enable the debtor himself to extend the period of limitation, and that will be the case unless the period of limitation is held to begin to run from the date when the district surveyor became entitled

(1) By the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11, "In all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose."

(2) (1858) 1 E. & E. 41.

(3) (1882) 51 L. J. (M.C.) 49.

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to demand the money: *Hornsey Local Board* v. *Monarch Investment Building Society*. (1) The period of limitation begins to run from that date as against all the three persons liable, i.e., the builder, the owner, and the occupier. It is a hardship on an owner who has already paid the fees to the builder, as he has done here, that he should be called upon to pay them again, and the Court will not strain the language of the statute so as to produce such a result.

Montague Shearman (*Ruegg, K.C.*, with him), for the respondent. The magistrate was right. Two separate rights are given to the surveyor by s. 157 of the London Building Act, 1894. By sub-s. 1 he is "entitled to receive" the fees within fourteen days of the building having been covered in, and by sub-s. 2 he may recover the fees in a summary manner on shewing that he has delivered a proper bill. The matter of complaint, therefore, on which these summonses were issued did not arise until the bill had been delivered to the owner. The time cannot begin to run until the right to prefer the complaint is complete; and as the owner cannot know for himself what the fees are, that right is not complete until the bill is delivered: *Jacomb* v. *Dodgson*. (2) There is no hardship on the owner, since he may always refuse to pay the builder until he is satisfied that the surveyor's fees have been paid.

Macmorran, K.C., replied.

LORD ALVERSTONE C.J. This case is one of very considerable difficulty; but, after the best consideration I can give, I do not see my way to interfere with the decision of the magistrate. I do not want to decide any more than is really necessary for this case, because, as I have said, I think the matter is one of very great difficulty.

The roofing of the houses was completed in December, 1899, and I understand it is agreed by both parties that at some date at the expiration of fourteen days from December, 1899, which would not, at any rate, be later than January 14, 1900, the surveyor became entitled to the fees that are now claimed. Between January 17, 1900, and September 10 he delivered

(1) (1889) 24 Q. B. D. 1. (2) (1863) 32 L. J. (M.C.) 113.

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bills specifying the amount of the fees contemplated by sub-s. 2 of s. 157 of the London Building Act, 1894, to the builder. On July 2 the builder became bankrupt, and on November 8, 1900, the summonses were taken out against the owner. Now, it is necessary for us, therefore, to consider whether the six months ran from January 14, 1900, at the latest, or whether they ran from the dates when the bills were given to the builder—in which case some of the summonses would be out of time—or whether they ran from the date of the notice to the owner, which was October 20, 1900, in which case none of the summonses would be out of time.

The material words for our consideration, there being no specific direction in the London Building Act, 1894, are the words in s. 11 of 11 & 12 Vict. c. 43. They are: "Such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose." It is possible to hold that the matter of such complaint and information arose generally when there was a neglect to pay the fees after fourteen days. I mean that it is quite possible to take the view that, when money becomes payable at a given date or on a given event, "the matter of such complaint and information respectively" arises then. But I think we cannot hold that the whole matter was clearly ascertained at the expiration of fourteen days from the roofing in of the houses. In the first place, at any rate with regard to some of the fees under this Act, and possibly with regard to some of the fees in this case, they are a matter of calculation which requires skilled ability and training in order to arrive at them. Some of the fees are for special services, and it would be necessary to know exactly how much the district surveyor himself had done. Therefore, I think we cannot say that at fourteen days from the roofing in the amount was ascertained or ascertainable by the person who had to pay the fees.

Under those circumstances, I think that the principle enunciated in the judgments of Field and Bowen JJ. in the case of *Pool and Forden Highway Board* v. *Gunning* (1) applies,

(1) 51 L. J. (M.C.) 49.

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namely, that, at any rate, at that time the amount could not be so ascertained as to enable the debtor to pay. Unfortunately that again does not enable us to decide the question, because we have to consider the rights of two people. As against the builder, assuming I am right, the time would run from the dates when the bills were sent in to him, and it is contended that, inasmuch as the owner has not to pay until there is default by the builder, and inasmuch as the owner may not know what he, the owner, has to pay until a notice has been served upon him, sub-s. 2 of s. 157 makes it impossible to bring proceedings against the owner until that notice has been sent to him, and that, therefore, the six months ought to run from that period. In support of that contention the case of *Labalmondiere* v. *Addison* (1) is cited, where undoubtedly it was decided that the six months only ran from the time of making the demand. But I think that that was a case in which the failure to fulfil the legal obligation could obviously not be ascertained until the demand.

I have come to the conclusion that the six months did not begin to run until a bill had been delivered to the builder. That would prevent us from being able to accede to the whole of the argument for the appellant, because, with regard to some of the summonses, it is admitted that the bills were not served upon the builder until a period less than six months before November 8, the date when the summonses were taken out. As regards the owner I have felt considerable difficulty; but, after consideration, I am of opinion that the time does not begin to run as against him until he has received a bill under the 2nd sub-section. It seems to me we have to consider when there is a default, and I do not think we can lay down any general principle which would exclude cases where the owner really may not know what has happened. Part of the amount claimed may have been paid. But, in any event, I think that primâ facie the neglect and default of the builder must be a neglect and default to pay after a bill has been delivered to him. I cannot say on the facts before me that there was such evidence of default as would justify the

(1) 1 E. & E. 41.

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six months commencing to run, the matter of complaint there being the neglect of the owner to pay after the default of the builder.

Therefore, I come to the conclusion with hesitation that we are not able in this case to say that any of these summonses were too late. I do not wish to decide more than that, because, as I have said, I can imagine such a state of circumstances that general principles might make it wholly inequitable that any summonses should be brought against either owner or occupier.

Now I have only to deal with the argument that it would be a great hardship upon an owner because in this particular case, and very likely in many cases, the whole obligation to pay these charges and expenses is put upon the builder by the owner, and in this case it is said he may have to pay twice over. I think that, although, of course, in one sense it is a hardship on the owner, it is not a hardship which ought to lead us to put any different construction upon the Act.

The fact that these fees are due from the owner, builder, and occupier must be known to everybody engaged in such operations. The owner need not enter into a contract whereby he relies upon the builder to indemnify him against these fees, and he need not under such a contract pay the builder the full amount due to him without being satisfied that his liability as owner has been discharged by the builder having paid these fees. I cannot see that the contractual relations between the builder and the owner ought to affect the rights of the surveyor to recover the fees.

For these reasons, I have come to the conclusion that we ought to affirm the decision of the magistrate in regard to all the summonses. If it should turn out that I am wrong, then I think we ought to affirm the decision of the magistrate so far as it relates to all summonses which were brought within six months of the delivery of the bill to the builder.

LAWRANCE J. I agree.

Appeal dismissed.

Solicitors for appellant: *West, King, Adams & Co.*
Solicitor for respondent: *H. S. Barnard.*

A. P. P. K.

WEATHERITT, APPELLANT *v.* CANTLAY, RESPONDENT.

1901
May 13.

Local Government—Sanitation—House let in Lodgings or occupied by Members of more than one Family—Artizans' Dwellings—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 94.

A building which is divided into separate tenements which are let as artizans' dwellings is not a "house" within the meaning of s. 94 of the Public Health (London) Act, 1891, so as to enable the sanitary authority to make by-laws for its regulation.

CASE stated by a metropolitan magistrate under the Summary Jurisdiction Acts.

On May 10, 1900, a summons was issued on a complaint preferred by the appellant Weatheritt, who was an officer of the vestry of St. George the Martyr, Southwark, against the respondent Cantlay, under certain by-laws made by the vestry in pursuance of s. 94 of the Public Health (London) Act, 1891 (1), in regard to houses let in lodgings or occupied by members of more than one family, charging that the respondent, as the landlord of a certain block of artizans' dwellings in Gun Street, Southwark, within the district of the vestry, had failed, after being served with a notice from the sanitary authority, to furnish the authority with a true statement of particulars in regard to such house.

The following facts were proved or admitted at the hearing: Artizans' Dwellings, Gun Street, Southwark, consist of two blocks of buildings, the front of which abut on Gun Street, and the backs on Silex Street, in the parish of St. George the Martyr.

(1) The by-laws, which purported to be made under the Public Health (London) Act, 1891, contained provisions for the regulation, supervision and inspection of "lodging-houses," which were defined to mean a house or part of a house which was let in lodgings or occupied by members of more than one family; but those lodging-houses were exempted from the operation of the by-laws in which the rent or charge payable by each lodger exclusive of any charge for use by such lodger of furniture was at the rate of 7*s.* 6*d.* per week or upwards, or where the rent or charge payable by each lodger and inclusive of any charge for use by such lodger of any furniture was at a rate exceeding 10*s.* 6*d.* per week.

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No. 2 block, the subject of the summons, is entered directly from Gun Street by a single entrance. There is a front door to the entrance, but no means of fastening the same beyond a Norfolk latch. The entrance passage branches into two passages about the centre of the building, and there are two double-roomed tenements and one single-roomed tenement on each outer side of the passage, and one single-roomed tenement between the two single branch passages. This is the arrangement on each of the four floors.

Each of the two-roomed tenements and of the single-roomed tenements is let to a separate family. Thus No. 1 (two rooms) was occupied by a man, wife, and four children, and No. 2 (two rooms) was occupied by a man, wife, and three children. The two-roomed tenements are let at a weekly rent of 6*s*. and 6*s*. 6*d*. a week, and the single-roomed tenements at 4*s*. a week.

At the back end of each passage on each of the floors there is a water-closet, sink, water-tap, and dust-shoot opening. On the south side this convenience serves for the use in common of four tenements, and on the north side for the use in common of three tenements. The staircase and passages are used in common. The tenements are generally occupied by a class of people who are not cleanly in their habits. The landlord does not live on the premises; a caretaker lives on the ground-floor who attends to minor repairs. He has no power to let the premises, but he receives deposits from tenants, and without the authority of the landlord has let four tenements, furnished, at 7*s*. per week. He also cleans the common passages and staircases and water-closets.

The names of the occupiers of the various tenements in the building appear on the rate-book, and each of the tenements is rated separately, but the landlord compounds for the rates.

It was contended for the respondent that as the tenements were in separate sets and the landlord did not reside on the premises, the building was not a lodging-house, and that the by-law had no application to a building of such a character.

It was contended for the appellant that the building in question was a house which was "let in lodgings or occupied

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by the members of more than one family" within the meaning of s. 94 of the Public Health (London) Act, 1891.

The magistrate upheld the contention of the respondent and dismissed the summons, but stated this case for the opinion of the Court. (1)

Macmorran, K.C. (*Corrie Grant* with him), for the appellant. The magistrate was wrong. This building is a house let in lodgings or occupied by members of more than one family within the meaning of s. 94 of the Public Health (London) Act, 1891, and the by-laws, therefore, applied. [He cited *Grant* v. *Langston* (2); *Attorney-General* v. *Mutual Tontine Westminster Chambers Association* (3); *Kimber* v. *Admans* (4); *Roots* v. *Beaumont.* (5)]

C. A. Russell, K.C. (*Burleigh Muir* and *C. J. B. Hurst* with him), for the respondent. The authorities as to the meaning of the word "house" in other statutes are irrelevant. The only question is whether this Act was intended to apply to such a building as this. If, so as the section is imperative and quite general without any limit of value, it will apply to every building let in flats. This is merely a collection of separate houses separately occupied but contained in one building. The object of the statute was to give the sanitary authority jurisdiction where a house (in the ordinary acceptation of the

(1) By the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 94, "(1.) Every sanitary authority shall make and enforce such by-laws as are requisite for the following matters (that is to say),

"(*a*) for fixing the number of persons who may occupy a house or part of a house which is let in lodgings or occupied by members of more than one family, and for the separation of the sexes in a house so let or occupied;

"(*b*) for the registration of houses so let or occupied;

"(*c*) for the inspection of such houses;

"(*d*) for enforcing drainage for such houses, and for promoting cleanliness and ventilation in such houses;

"(*e*) for the cleansing and limewashing at stated times of the premises;

"(*f*) for the taking of precautions in case of any infectious disease.

"(2.) This section shall not apply to common lodging-houses within the Common Lodging Houses Act, 1851, or any Act amending the same."

(2) [1900] A. C. 383.

(3) (1876) 1 Ex. D. 469.

(4) [1900] 1 Ch. 412.

(5) (1886) 51 J. P. 197.

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term) was let in lodgings, either furnished or unfurnished, and it was not intended to apply to such a state of things as this.

Macmorran, K.C., replied.

LORD ALVERSTONE C.J. Now that this case has been fully argued out, there does not seem to be much difficulty in arriving at a decision. None of the cases that have been cited on the meaning of the word "house" are of much assistance to us. It is necessary, I think, to look at the object of this particular legislation and to construe the section accordingly. By s. 94 of the Public Health (London) Act, 1891, sub-s. 1 (*a*), it is provided that the sanitary authority may make by-laws "for fixing the number of persons who may occupy a house or part of a house which is let in lodgings or occupied by members of more than one family." The object of that legislation was to allow the sanitary authority to control the number of people who should occupy any tenement which might fairly be described as a separate house. I draw no distinction between the expression "let in lodgings" and "occupied by members of more than one family," except that one state of facts may bring a case within one phrase, and another within the other. Nor do I think it matters whether the lodgings are furnished or unfurnished. In order to bring the case within the section there must be a house which is either entirely let in lodgings or occupied by members of more than one family, or part of which is so let or occupied.

It is said that in this case the whole structure is a "house" within the meaning of the section. One reason for doubting whether that can be the proper construction is the extraordinary result that would follow. The section would then apply to all blocks of buildings occupied as residential flats, and the result would be that if any of those flats were let in lodgings the whole block would come within the purview of this section.

It is true, no doubt, that the particular by-laws under consideration are limited by the imposition of a pecuniary value; but when regard is paid to the general words of the section

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there seems no reason why any pecuniary limit should be imposed.

In my opinion, for the purpose of this section, the building in this case is a collection of houses. It has no front door in the ordinary sense, and the passages and staircase are common to all the tenements that it contains, and on them the front doors of the separate tenements open. I think, therefore, that those tenements are separately occupied, and that each of them is a house within the meaning of the section. If any one of those tenements is let in lodgings or occupied by members of more than one family, then the landlord of that particular tenement would come within the by-law; but I think it would be too much to say that the whole building is a house within the meaning of the section, and that it comes within the by-law as a whole. In my view it is a collection of separate houses which are separately occupied, and I think, therefore, that the learned magistrate was right.

LAWRANCE and PHILLIMORE JJ. concurred.

Appeal dismissed.

Solicitor for appellant: *J. A. Johnson.*
Solicitors for respondent: *Medwin & Co., Horsham.*

A. P. P. K.

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May 13.

GOULDER, APPELLANT *v.* ROOK, RESPONDENT.
BENT ,, *v.* ORMEROD ,,
LEE ,, *v.* BENT ,,
BARLOW ,, *v.* NOBLETT ,,

Adulteration—Food (and Drugs)—Beer—Liability of innocent Vendor for Beer contaminated by Admixture of Arsenic—Sufficiency of Certificate of Analyst—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict.* c. 63), ss. 3, 6.

Beer, with which a certain quantity of arsenic injurious to health had been mixed in the process of manufacture accidentally and in ignorance, was sold by a retailer without knowledge or reasonable grounds for suspicion of the presence of the arsenic in the beer:—

Held, that there was evidence that the beer was not of the nature, substance, and quality of the article demanded by the purchaser, and that the retailer could be convicted under s. 6 of the Sale of Food and Drugs Act, 1875.

Certificates of public analysts stating in one case that the sample of beer "contains arsenic," and in the other case that it "contains a serious quantity of arsenic," held to be insufficient.

FOUR cases stated by magistrates under the Summary Jurisdiction Acts.

GOULDER *v.* ROOK.

Upon the hearing of a certain information and complaint preferred by the respondent Rook against Elizabeth Goulder, the appellant, under s. 6 of the Sale of Food and Drugs Act, 1875 (1), the following facts were proved or admitted.

(1) By the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 3, "No person shall mix, colour, stain, or powder, or order or permit any other person to mix, colour, stain, or powder, any article of food with any ingredient or material so as to render the article injurious to health with intent that the same may be sold in that state, and no person shall sell any such article so mixed, coloured, stained or powdered under a penalty in each case not exceeding 50*l.* for the first offence; every offence after a conviction for a first offence shall be a misdemeanour for which the person on conviction shall be imprisoned for a period not exceeding six months with hard labour."

By s. 5, "Provided that no person shall be liable to be convicted under either of the two last foregoing sections of this Act in respect of the sale of any article of food or of any drug if he shews to the satisfaction of the justice or Court before whom he is charged that he did not know of the article of food or drug sold by him

The appellant was a retailer of beer, and the respondent an inspector under the Sale of Food and Drugs Acts.

The sample of beer taken by the purchaser contained arsenious acid to the extent of not less than one-eighth of a grain per gallon, the analyst's certificate being as follows:—

"I, the undersigned public analyst for the city of Manchester, do hereby certify that I received on November 21, 1900 . . . . a sample of beer . . . . for analysis . . . . and have analyzed the same, and declare the result of my analysis to be as follows: I am of opinion that the said sample contained the parts as under of foreign ingredients, viz., arsenious acid to the extent of not less than one-eighth of a grain per gallon. No change had taken place in the constitution of this sample that would interfere in any way with the analysis.

"As witness my hand, November 30, 1900.

"C. Estcourt, F.I.C."

The appellant did not mix the arsenic in the beer herself, and did not know of its existence in the beer, nor could she be

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being so mixed, coloured, stained, or powdered as in either of those sections mentioned, and that he could not with reasonable diligence have obtained that knowledge."

By s. 6, "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser under a penalty not exceeding twenty pounds, provided that an offence shall not be deemed to be committed under this section in the following cases—that is to say,

"(1.) Where any matter or ingredient not injurious to health has been added to the food or drug because the same is required for the production or preparation thereof as an article of commerce in a state fit for carriage or consumption, and not fraudulently to increase the bulk, weight, or measure of the food or drug, or conceal the inferior quality thereof.

"(2.) Where the drug or food is a proprietary medicine, or is the subject of a patent in force and is supplied in the state required by the specification of the patent.

"(3.) Where the food or drug is compounded as in this Act mentioned.

"(4.) Where the food or drug is unavoidably mixed with some extraneous matter in the process of collection or preparation."

By s. 21, "At the hearing of the information in such proceeding the production of the certificate of the analyst shall be sufficient evidence of the facts therein stated, unless the defendant shall require that the analyst shall be called as a witness. . . . ."

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expected to know of or suspect its existence in the beer, nor could she be expected to know of or suspect the existence of such an admixture. It was further proved that arsenic was an ingredient injurious to health, and that the quantity of arsenic in the beer was such as to render the same injurious to health, but that it did not form one of the constituents of beer.

The arsenic had been unknowingly mixed with the beer by the brewer through having been improperly introduced in the manufacture of some substance used in brewing.

The magistrate found as a fact that the beer sold by the appellant was not of the nature, substance, and quality of the article demanded by the purchaser, and he convicted the appellant of an offence under s. 6 accordingly.

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In this case precisely similar facts were proved or admitted, and the magistrates found as a fact that the beer sold was not of the nature, substance, and quality of the article demanded by the purchaser "in that there had been mixed with it an ingredient prejudicial to the health of the purchaser." They therefore declined to convict under s. 6, holding that the proceedings had been wrongly brought under that section.

LEE *v.* BENT.

In this case the facts proved or admitted were of a similar character, and the justices convicted the appellant of an offence under s. 6. The certificate of the analyst was, however, in the following terms: "We, the undersigned, public analysts for the county of Lancaster, do hereby certify that we received . . . . a sample of beer for analysis and have analyzed the same, and declare the result of our analysis to be as follows: We are of opinion that the said sample contains arsenic."

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This case was in all respects similar to the case in *Lee* v. *Bent*, except that the material part of the analyst's certificate ran: "We are of opinion that the said sample contains a serious quantity of arsenic."

Moulton, K.C. (*Montague Lush* with him), for the appellant in *Goulder* v. *Rook*. The proceedings were wrongly instituted under s. 6, and ought to have been taken under s. 3. In that case the want of knowledge on the part of the retailer would have been a defence. This was not a case of adulteration under s. 6, but of contamination by the beer being mixed with some injurious ingredient under s. 3. Sect. 6 is intended to deal with cases where some of the bulk of the article demanded has been abstracted and some other article substituted for it, as in the case of watered milk. A person holding himself out as selling an article is bound to know that it is not adulterated, and therefore in prosecutions under s. 6 ignorance that the article sold is not of the nature, substance, and quality of the article demanded is no excuse. But where an article has been accidentally contaminated, as here, by being mixed with some injurious ingredient, and the bulk of the article is not affected, the right proceeding is under s. 3, and the retailer should be allowed to rely on his ignorance as a defence under s. 5. Adulterated beer is not beer at all; but this was beer, although contaminated by an admixture of arsenic.

Lawson Walton, K.C. (*T. F. Byrne* with him), for the respondent. The prosecution was rightly instituted under s. 6, since the wholesomeness of an article is clearly a matter affecting its nature, substance, and quality. Sect. 3 deals with the mixing of injurious ingredients with articles of food with the intent that they may be sold, and the exemption given by s. 5 only applies to a person selling the article so mixed in ignorance. This was not a case within s. 3 at all, since the arsenic was not mixed with the beer with the intent that it should be sold, but accidentally and in ignorance that it was being so mixed. Sect. 6 is not confined to cases of substitution of an inferior article for the thing demanded. [He cited *Betts* v. *Armstead* (1); *Parker* v. *Alder*. (2)]

Moulton, K.C., replied.

Joseph Walton, K.C. (*Pickford, K.C.*, *E. Sutton*, and *F. H. Mellor* with him), for the appellant in *Bent* v. *Ormerod*. The magistrates were wrong in declining to convict under s. 6.

(1) (1888) 20 Q. B. D. 771. (2) [1899] 1 Q. B. 20.

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Because proceedings might have been taken under s. 3, that does not prevent them from also being taken under s. 6: *Dickins* v. *Randerson*. (1) The offences created by the two sections overlap one another, and are not mutually exclusive. [He cited *Hoyle* v. *Hitchman*. (2)]

Montague Lush (*Moulton, K.C.* with him), for the respondent. According to the contention of the appellant, every case under s. 3 would also come within s. 6. That cannot be the intention of the Legislature. No doubt some cases which would fall under s. 3 would also come within s. 6; but the distinction is that, in order that the case should come within s. 6, the article must be adulterated by something being substituted for it or a part of it which the purchaser did not ask for. Here, what was mixed with the beer was not added for the purpose of adulterating it. No doubt the magistrates found that the beer was not of the nature, substance, and quality of the article demanded, but only on the ground that an injurious ingredient had been mixed with it, and that fact takes it out of s. 6, and makes it, if anything, an offence under s. 3.

Joseph Walton, K.C., replied.

Montague Lush (*Moulton, K.C.*, with him), for the appellants in *Lee* v. *Bent* and *Barlow* v. *Noblett*. In both these cases the certificate is clearly insufficient, in that it does not state the constituent parts of the sample analyzed: *Fortune* v. *Hanson* (3); *Newby* v. *Sims*. (4)

Joseph Walton, K.C. (*Pickford, K.C., E. Sutton*, and *F. H. Mellor* with him), for the respondent. The certificates are sufficient. In both the cases cited there was adulteration with water, which was itself a constituent part of the article demanded, and it was held that the proportions must be stated in order to enable the Court to say whether there had been adulteration or not. Except in cases of adulteration, the certificate need only state the result of the analysis: *Bakewell* v. *Davis* (5), and it is not necessary that it should state the constituent parts of the sample: *Bridge* v. *Howard*. (6) At the most the

(1) [1901] 1 K. B. 437.
(2) (1879) 4 Q. B. D. 233.
(3) [1896] 1 Q. B. 202.
(4) [1894] 1 Q. B. 478.
(5) [1894] 1 Q. B. 296.
(6) [1897] 1 Q. B. 80.

certificate of the analyst is merely evidence, and, though it may not contain facts sufficient to convict, it may be supplemented by other evidence.

Montague Lush was not called on to reply.

LORD ALVERSTONE C.J. It will be convenient in the first place to deal with the points raised in the two cases of *Lee* v. *Bent* and *Barlow* v. *Noblett*. In the first of these cases the analyst had certified that the sample contained arsenic; and in the second case that it contained a serious quantity of arsenic. Now, we are all of opinion that these two certificates are not sufficient. It is very important that the practice should be uniform, and we think it is clear, after the series of decisions to which we have been referred, that the certificate of the analyst must be a document in proper form, and that that certificate ought to contain in it sufficient materials to enable the magistrates to form a judgment on those materials whether the offence charged had been committed. We need not consider whether a certificate would be bad which went further, but we think at least it must fulfil that condition. There are many cases in which the only evidence is the certificate of the analyst. Nothing is said in these two certificates as to what ordinary beer—I will not say absolutely pure beer, but ordinary beer—should contain, and nothing is said as to the degree or amount of arsenic found in the sample except in the one case that arsenic was there, and in the other case that there was a serious quantity of arsenic. We think, having regard to the necessary protection of the person charged, that the certificates ought to contain further particulars, so that the magistrates may have before them materials on which they can come to a conclusion. We could not decide otherwise without overruling several decisions which seem to us to be founded in good sense. We need not consider whether or not in every particular case it is absolutely necessary to say that the certificate must set out all the proportions of the ingredients contained in the sample, but we are justified in saying that these certificates are not sufficient. That disposes of the two cases of *Lee* v. *Bent* and *Barlow* v. *Noblett*, in

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both of which the conviction must be quashed. I now come to the more important and more difficult point which was raised in *Goulder* v. *Rook* and *Bent* v. *Ormerod*. I am of opinion that the conviction in the former case should be supported, and that the case of *Bent* v. *Ormerod*, in which there has been a dismissal of the charge, should go back to the justices for conviction. A great deal of the difficulty disappears if the language of s. 6 is considered by itself. I quite agree that if it is plain that one group of sections deals with one class of offence, and another group of sections deals with another class of offence, the consideration and comparison of the language of the two groups of sections may afford very material assistance. On the other hand, it has not been disputed that the fact that sections which create separate offences overlap does not shew that a case may not be within both of them. It may very likely be that the facts afford grounds for prosecuting under more than one section. There are numerous instances of that in our criminal statutes; but I think the question under s. 6 is whether or not a person has sold an article of food or a drug which is not of the nature, substance, and quality of the article demanded by a purchaser. If I may use the expression, in my opinion s. 6 starts at the sale and ends at the sale. There is no need to consider how that which makes the article otherwise than of the nature, substance, and quality of the article demanded has got into it, but the question is whether in fact it is there to such an extent that the article is different in nature, substance, and quality. I think it would be cutting the section down unwisely, and cutting it down without sufficient direction in the statute, if we were to hold that it was needful to enter into an examination of the stage at which, or the precise process by which, that which makes the article different has found its place in the article which is being sold. Now, applying that test, the magistrate in *Goulder* v. *Rook* has found as a fact that the beer sold by the appellant was not of the nature, substance, and quality of the beer demanded by the purchaser. The certificate shews that arsenious acid to the extent of not less than one-eighth of a grain per gallon was there, and he finds as

a fact "that arsenic was an ingredient injurious to health, and that the quantity of arsenic in the beer was such as to render the same injurious to health, but that it did not form one of the constituents of beer." I read those words as meaning that arsenic does not form one of the constituent parts of beer in any substantial degree under ordinary circumstances. It is plain that if I am right in the view I have expressed as to the primâ facie meaning of s. 6, since the magistrate has found as a fact that this article was not of the nature, substance, and quality of that demanded by the purchaser, then, if there was any evidence which could support such a conclusion, the conviction must stand. I have already indicated that the magistrate having before him a case in which a dangerous foreign body was present to the extent of one-eighth of a grain per gallon, which is injurious to health, it seems to me that, he having drawn the conclusion that the beer sold was not of the nature, substance, and quality of the article demanded, it is not possible for us to say that he was wrong. It has been suggested that if what is in the article is the result of some ingredient put into it in the course of its manufacture which in fact makes it injurious to health, that it can only be a "mixing" under s. 3, and that the offence can only fall within the terms of that section. The penalty is very much more severe under s. 3, and knowledge is made of the essence of the offence—that is to say, the defendant is not convicted of an offence if he proves that he did not know, and had no means of knowledge, that injurious ingredients had been mixed with the article. Under s. 6 the penalty is less, and it has been expressly decided in two or three cases that the knowledge of the person charged is immaterial—that is to say, however innocent, however little he may have known, yet he may be convicted under s. 6. In the second case that was argued before us—that is to say, *Bent* v. *Ormerod*—the finding of the magistrates was the same, although the summons was dismissed. They found as a fact that the beer sold by the respondent "was not of the nature, substance, and quality of the article demanded by the purchaser, in that there had been mixed with it an ingredient prejudicial to the health of the purchaser." It was proved there was

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arsenic in the sample to the extent of one-ninth of a grain per gallon at the least; and it is also stated in the case that arsenic does not form one of the constituents of beer, and the quantity of arsenic in the beer was such as to render the same injurious to health. Under these circumstances, I come to the conclusion that there was evidence on which the magistrates could find as a fact that there was an article sold different in nature, substance, and quality from that demanded, and, therefore, that the conviction in *Goulder* v. *Rook* ought to stand, and that in *Bent* v. *Ormerod* the case must be remitted to the magistrates with the expression of our opinion that there should be a conviction.

I only desire to add that I must not be understood to suggest that every accidental introduction of deleterious matter into an article sold for food of necessity makes it different in nature, substance, and quality from the article demanded. It is for the magistrates in each case to find whether in fact the article supplied is of the nature, substance, and quality of the article demanded.

LAWRANCE and PHILLIMORE JJ. concurred.

Judgment accordingly.

Solicitors: *Grundy, Kershaw, Samson & Co., for Grundy, Kershaw, Samson & Co., Manchester; T. Hudson, Manchester; Snow, Fox & Higginson, for Harcourt E. Clare, Preston.*

A. P. P. K.

SQUIRE *v.* BAYER & CO.

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May 9.

Employer and Workman—Contract for Deductions in respect of Fines—Specification of Acts or Omissions in respect of which Fine may be imposed—Truck Act, 1896 (59 & 60 *Vict. c.* 44), *s.* 1.

By s. 1, sub-s. 1, of the Truck Act, 1896, an employer may not contract with a workman for any deduction from wages in respect of fines unless (inter alia) "the contract specified the acts or omissions in respect of which the fine may be imposed."

One of the rules of a factory provided that "all workers shall observe good order and decorum while in the factory," and imposed a fine of sixpence or less upon any worker guilty of an infringement of the rule :—

Held, that the rule, although not specifying the particular acts or omissions amounting to such a breach of good order or decorum as to justify the infliction of a fine, was a sufficient compliance with the requirements of the section.

CASE stated by justices for the city and county of Bristol.

The respondents had been summoned to answer the information and complaint of the appellant alleging that they, being employers within the Truck Act, 1896, unlawfully made a contract with a workman for a deduction for or in respect of a fine of sixpence or less from the sum contracted to be paid by them to the workman contrary to s. 1, sub-s. 1, of that Act, in that the contract did not specify the acts or omissions in respect of which the fine might be imposed, and the fine imposed under the contract was not in respect of some act or omission which caused, or was likely to cause, damage or loss to the employers, or interruption or hindrance to their business, whereby they were liable to a penalty not exceeding 10*l.*

The appellant was an inspector of factories, and the respondents were corset manufacturers occupying works which were a factory within the meaning of the Factory and Workshops Acts, 1878 to 1895. The terms of the contract between the respondents and their employees were contained in a set of rules, among which was the following provision: "All workers shall observe good order and decorum while in the factory, and shall not do anything which may interfere with the proper and orderly conduct of the business thereof, or of any department

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thereof; and shall in all respects obey the lawful commands of the general manager, forewoman, or superintendent of their respective departments. A fine of sixpence (or less at the discretion of the manager) shall be paid by each worker who shall be guilty of any infringement of this rule." A machinist named Helen Robbins (who was a workman within the meaning of the Act) was employed by the respondents under a contract upon the terms contained in the rules.

The respondents granted to their employees the privilege of having their dinners in the workroom of the factory between 1 and 2 P.M.; but the employees were not obliged to have their dinners there, and could dine elsewhere if they wished. The rules of the factory were in force during the dinner hour as as well as at other times, and this was known to the employees. One day in November during the dinner hour Miss Knight, who was then in charge of the factory, and whose room was immediately underneath that in which the employees were having dinner, heard a considerable noise and commotion going on in that room, and on going there discovered Robbins playing a small harp to the music of which several girls were dancing, singing, and clapping their hands. Miss Knight, in the course of her duty, reported this disorder, and Robbins and some others were fined twopence each. Robbins stated at the hearing that she had not been told that it was wrong to dance and sing during the dinner hour, and that she was not aware there was any harm in it; but it was proved that a copy of the rules was posted in that workroom and other copies at other places in the factory, and Robbins admitted that she and the other girls would not have done what they did if Miss Knight had been present.

It was proved before the justices that the disorder and dancing caused considerable dust, and that dust would cause injury to the machines at which the employees worked as well as to the material served out to them to work upon. It was further proved that no fines were deducted from the wages of the employees, but a fine-book was kept, and once a week the employees were asked to pay such fines after they had received their wages in full, and a receipt was given for the fine, the one given to Robbins being as follows: "The sum of 2*d*. has this

day been received from Robbins in respect of a fine for making noise during dinner hour."

The appellant contended (*a*) that the rule did not specify the acts or omissions in respect of which a fine might be imposed; and (*b*) that the fine imposed under the rule was not in respect of some act or omission within the meaning of s. 1, sub-s. 1, of the Truck Act, 1896.

The respondents contended that the words of the rule sufficiently specified the acts and omissions in respect of which a fine might be imposed, and that the fine inflicted was in respect of an act which caused, or was likely to cause, damage or loss to the respondents, or interruption or hindrance to their business.

The justices found as a fact upon the evidence that good order and decorum were not observed, and that dancing and disorder were likely to cause damage or loss to the respondents and injury to the discipline necessary to be enforced in a factory of that description. They also found as a fact that the rule (which was the only one in dispute before them) constituted a reasonable contract between the respondents and their employees for securing good order and decorum in the factory, and complied with s. 1, sub-s. 1 (*b*) and (*c*), of the Act, and they accordingly dismissed the information. The question for the opinion of the Court was whether on the facts stated the justices came to a right conclusion.

The Attorney-General (*Sir R. B. Finlay, K.C.*), (*H. Sutton* with him), for the appellant. The respondents were guilty of a breach of s. 1, sub-s. 1, of the Truck Act, 1896. That section was passed in consequence of the difficulty as to whether deductions for fines were an infringement of the old Truck Act, it having been held that that Act did not apply to fines, which were mere non-payment of wages, and not covered by an Act directed only to payment of wages. The object of the section is to secure that notice shall be given to the employees of the specific acts which render them liable to a fine. In the present case the rule is too general; it should specify the breaches of good order and decorum in respect of which a fine may be inflicted. It leaves everything to the discretion of the master

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as to what constitutes such a breach. There was no evidence of a breach of the rule by Robbins.

Foote, K.C. (*Douglas Metcalfe* with him), for the respondents. The notice is sufficient to satisfy the statute; it is impossible to give an exhaustive list of breaches of good order and decorum. All breaches of good order during working hours would be an interruption of work, but would not necessarily be so during the dinner hour; if the appellant is right, it would therefore be necessary to have two separate orders or notices, one for working hours and one for the dinner hour; this would be unreasonable, and the alternative is to apply reasonably a code of rules drawn up for all hours. Where a rule deals with large classes of offences some generality must be allowed. The finding of the justices that there had been a breach of the rule is conclusive.

The Attorney-General, in reply.

LORD ALVERSTONE C.J. This case is not free from difficulty, but I cannot see my way to hold that the decision of the justices was wrong. The two questions which arise for our consideration are, first, whether the rule is valid, and, secondly, whether the breach was such as to justify the infliction of a fine. I do not dissent from the view of the Attorney-General as to the conditions which must be present in order to justify the infliction of a fine; there must be a contract between the employer and the workman complying with the requirements of s. 1, sub-s. 1 (*a*), (*b*), (*c*), and (*d*), of the Act; and, further, under sub-s. 2, the deduction must be in accordance with the contract, and particulars must be supplied to the workman.

In the present case the justices found that there was during the dinner hour disorder in this particular room in the factory, that to the knowledge of the employees the rules were in force in the factory in the dinner hour, and that the disorder was reported by the clerk who was then in charge. We have been pressed with the argument that a rule which provides that "all workers shall observe good order and decorum while in the factory" is not a sufficient specification of the "acts and omissions in respect of which the fine may be imposed." But

there are many kinds of business, and the expression "good order and decorum" must be interpreted with reference to the requirements of the particular business, and it would be going too far to say that the language of the rule is necessarily too general. In a sense, of course, it does not specify the particular acts and omissions amounting to such a breach of good order or decorum as to justify the infliction of a fine, but I think it a sufficient compliance with the requirements of the Truck Act, 1896, to say that a fine may be inflicted if the employee does not observe good order and decorum while in the factory.

Then it was contended by the Attorney-General that there was no evidence of anything done by the girl Robbins which could fairly be held to amount to non-observance of the rule; I think, however, that the facts found by the justices prevent this point being raised. It is clearly found that some of the girls were dancing to the tune she was playing on the harp, and that such conduct was not an observance of good order and decorum, and that it was likely to cause injury, by reason of the dust raised, both to the machinery and the materials. We cannot take the isolated case of the girl who played the music and consider it by itself apart from the other circumstances, and say that it was not part of the disorder. We must look at the whole of the circumstances, and if the rule is in accordance with the requirements of the statute we cannot say that there was no evidence of a breach of good order and decorum, having regard to all the attendant facts. I think, also, that we cannot entirely shut out of consideration the fact that the employees were allowed to have their meals in the workroom, where there were much valuable machinery and materials; some regard must be had to the place where the breach of good order and decorum took place. For these reasons, I am of opinion that this appeal must be dismissed.

LAWRANCE J. I am of the same opinion.

Appeal dismissed.

Solicitor for appellant: *Solicitor to the Treasury.*
Solicitors for respondents: *Reader & Co.*

W. J. B.

C. A.
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May 20, 23.

[IN THE COURT OF APPEAL.]

In re An Arbitration between HARWOOD and ABRAHAMS.

Practice—Security for Costs—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37)—*Appeal from County Court.*

An appeal against a decision of a county court judge upon an application for compensation under the Workmen's Compensation Act, 1897, is not in the nature of a motion for a new trial, and the appellant can be ordered to give security for the costs of the appeal.

Application for security for the costs of an appeal against a decision of a county court judge acting as arbitrator under the Workmen's Compensation Act, 1897.

The father of a young man aged twenty-one, who was killed by an accident, applied under the Act for compensation from the son's employer, on the ground that he was, within the meaning of Sched. I. to the Act, a "dependant" in part dependent on his son's earnings at the time of his death. The judge held that there was no evidence that the father was a "dependant," and refused the application. The father appealed. By his notice of appeal he asked that the award or judgment made or given in the arbitration might be reversed, and that it might be awarded or adjudged that the applicant was a dependant of his son in respect to compensation payable to the dependants of the son under the Act for the injury caused to the applicant by the death of the son, which injury resulted from an accident arising out of and in the course of his employment by the respondent, on the ground that evidence was given at the hearing before the judge upon which he could and should have found that the applicant was a dependant within the meaning of the Act, and that in holding that there was no such evidence the judge misdirected himself.

The employer applied that the appellant might be ordered to give security for the costs of the appeal.

R. Minton-Senhouse, for the employer.

J. S. Green, for the appellant. This appeal is analogous to an application for the new trial of an action, in which case it has been held that security ought not to be required: *Heckscher* v. *Crosley* (1); *Rickaby* v. *Rickaby*. (2) In one event there would have to be a new hearing before the county court judge. In most cases under this Act, if a workman is required to give security for the costs of an appeal he will not be able to proceed with his appeal, and there may be a denial of justice. In *Main Colliery Co.* v. *Davies* (3) the appeal was by the employer. Though, as was held in *Mountain* v. *Parr* (4), a county court judge has no jurisdiction to grant a new trial of an application for compensation under this Act, there can be a rehearing in the nature of a new trial.

R. Minton-Senhouse, in reply. The question of "dependency" is entirely a question of fact in each case: *Main Colliery Co.* v. *Davies*. (3) Security for costs has been ordered in similar cases, and the point now taken has never been raised before.

COLLINS L.J. The point is one of some importance, and we should like to consult the other members of the Court of Appeal.

Cur. adv. vult.

May 23. COLLINS L.J. We have had an opportunity of consulting the Master of the Rolls, and he agrees with us in thinking that the point which has been taken, that this appeal is in the nature of a motion for a new trial, is not well founded. The rule that security will not be required for the costs of a motion for a new trial of an action is somewhat anomalous. It is an incident of the old practice whereby the costs of a motion for a new trial, as well as those of the original trial, were made to abide the result of the new trial, which practice, though still followed, grew up at a time when the judge at nisi prius had no function but to assist at the disposal of the issue

(1) [1891] 1 Q. B. 224.
(2) [1901] P. 134.
(3) [1900] A. C. 358.
(4) [1899] 1 Q. B. 805.

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by a jury. There is no doubt as to the rule, but it is somewhat anomalous, and we think it ought not to be extended to a case which is not strictly a motion for a new trial. The appellant must give security to the amount of 15*l.*

STIRLING L.J. concurred.

Solicitors: *Wynne-Baxter & Keeble; A. J. Harman.*

W. L. C.

[IN THE COMMERCIAL COURT.]

1901 *March* 22; *April* 2.

REPETTO *v.* MILLAR'S KARRI AND JARRAH FORESTS, LIMITED.

Ship—Charterparty—Bill of Lading—Incorporation of Conditions of Charterparty in Bill of Lading—Freight made payable as per Charterparty—Action for Freight—Right of Master to sue.

By a charterparty, containing the usual exceptions, freight was made payable on the unloading and right delivery of the cargo, which was to be provided by the charterers; the master was to sign bills of lading at the port of loading, and upon the completion of the loading the charterers' liability under the charterparty was to cease. The charterers having placed the cargo on board at the port of loading, bills of lading were signed by the master, whereby the cargo was made deliverable to the shippers or their assigns at the port of discharge, "they paying freight for the same as per charterparty." In an action by the master against the charterers for freight:—

Held, that the master, in signing the bills of lading, had done so merely as agent for the shipowner, and was therefore not entitled to maintain the action.

ACTION FOR FREIGHT.

The following statement of facts is taken from the written judgment of Bigham J.:—

This action is brought by Lorenzo Repetto, the master of a vessel called the *Beecroft*, to recover a balance due for freight. The indorsement on the writ shews that the gross freight was 3383*l.* 6*s.* 5*d.*, and that this amount has been reduced by payments on account and by disbursements for the ship at the ports of loading and discharge to a sum of 256*l.* 17*s.* 10*d.*

Since action brought a further sum of 39*l.* 1*s.* has been paid, leaving 217*l.* 16*s.* 10*d.*, the balance sued for. The defendants do not dispute that they owe this balance, but they say they owe it to the owners and not to the plaintiff, and that they have a set-off as against the former to the amount of the claim. The question I have to determine is whether the plaintiff (the master) can maintain the action. The facts are as follows:—

By a charterparty dated August 28, 1899, Fortunato Repetto (not the plaintiff) chartered the vessel to the defendants to bring a cargo of timber from Australia at an agreed rate of freight, the defendants undertaking to provide the cargo. The charterparty contained the usual exceptions. The freight was to be paid on unloading and right delivery of the cargo. Then there was the following clause: "The captain to sign bills of lading at any rate of freight without prejudice to this charter, and should the bills of lading for the entire cargo shew less sums in the aggregate than the amount of freight due to the ship under this charter (allowing for advances to the master) the difference to be paid at port of loading in cash. The charterers' liability under this charter to cease on being loaded. Ship to have an absolute lien on the cargo for freight, dead freight, and demurrage."

The defendants loaded the cargo and presented bills of lading to the plaintiff for signature. These bills of lading describe the cargo as shipped in the *Beecroft*, "whereof L. Repetto is master." The exceptions were more extensive than those mentioned in the charterparty. The bills of lading provided that the cargo should be delivered "to the shippers or their assigns, they paying freight for the same as per charterparty dated August 28, 1899, all the terms and exceptions contained in which charter are herewith incorporated." These bills of lading the plaintiff signed as master of the ship. The ship then proceeded on her voyage, and on her arrival at the port of discharge the cargo was delivered to the defendants against presentation of the bills of lading. This action was then brought, and was no doubt brought in the name of the master, Lorenzo Repetto, in the hope that the defendants might thereby

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be precluded from setting up the set-off which they allege they have against Fortunato Repetto.

Scrutton, K.C., and *Leck*, for the plaintiff. The action is properly brought by the master. It is true that the defendants could not be sued for freight in an action on the charterparty, because by reason of the cesser clause their liability under that instrument to pay freight ceased as soon as the cargo was shipped, but they can be sued upon their contract in the bill of lading to pay freight: *Gullischen* v. *Stewart*. (1) Upon a bill of lading signed by the master in the ordinary way either the master himself or the shipowner can sue or be sued. The master, no doubt, signed the bills of lading as agent for the owner, but he signed them in his own name, and the case is the ordinary one of an agent contracting in his own name on behalf of an undisclosed principal; in such a case the agent may sue upon the contract in his own name: *Thomson* v. *Davenport*. (2) The present case is not affected by the fact that the defendants knew that there was a principal upon whose behalf it might be assumed that the plaintiff was contracting. The master could clearly be sued on such a contract: *Elbinger Actien Gesellschaft* v. *Claye* (3); conversely, he must be able to sue upon it. The fact that the bill of lading excepts the barratry and negligence of the master does not negative the contention that the contract was made with him, for there is no valid reason why he should not in the contract protect himself against the consequences of his acts: *Westport Coal Co.* v. *McPhail*. (4) Even assuming that the master cannot sue upon the contract in the bill of lading, there was an implied promise by the defendants to pay freight upon which he can sue; while he held the goods the master was in a position to enforce his lien, but he gave up possession of the goods at the defendants' request; and from that request there must be implied a promise by the defendants to the plaintiff to pay freight.

[They also cited *Brouncker* v. *Scott* (5); *Priestly* v.

(1) (1884) 13 Q. B. D. 317.
(2) (1829) 9 B. & C. 78; 32 R. R. 578.
(3) (1873) L. R. 8 Q. B. 313.
(4) [1898] 2 Q. B. 130.
(5) (1811) 4 Taunt. 1.

Fernie (1); *Smith* v. *Plummer* (2); *Atkinson* v. *Cotesworth* (3); *Sims* v. *Bond* (4); *Calder* v. *Dobell* (5); *Jesson* v. *Solly* (6); *Cawthron* v. *Trickett* (7); *Evans* v. *Forster* (8); *Allen* v. *Coltart* (9); *Shepard* v. *De Bernales* (10); *Jones* v. *Nicholson* (11); *Rodocanachi* v. *Milburn* (12); *Leduc* v. *Ward* (13); *Hansen* v. *Harrold* (14); *Wagstaff* v. *Anderson*. (15)]

J. A. Hamilton, K.C. (*P. C. Morris* with him), for the defendants. The action is not maintainable. Assuming that the bill of lading constitutes the contract, the question is whether the master was a party to it, and that is a question of inference from all the documents; the proper inference in the present case is that he was not. It was never intended that the plaintiff should be a party to the contract at all, nor was it contemplated that the effect of his signing bills of lading would be to make a new contract with different parties to those in the charterparty. The signature of the master was in fact the signature of the owner to the contract, and the master was not a party to the bill of lading at all. The expression in the bill of lading, "they paying freight as per charterparty," shews clearly that the intention was that the contracting parties to the bill of lading should be the same as those to the charterparty. The exceptions of the barratry and negligence of the master are inserted for the express purpose of affording an answer to an action brought by the master as representing the owners. There was no implied contract to pay freight to the plaintiff; whether there is an implied contract must always be a question of the intention of the parties, and there is no evidence in the present case from which such an intention can properly be inferred. [He cited the following additional

(1) (1865) 3 H. & C. 977.
(2) (1818) 1 B. & A. 575; 19 R. R. 391.
(3) (1825) 3 B. & C. 647; 27 R. R. 450.
(4) (1833) 5 B. & Ad. 389; 39 R. R. 511.
(5) (1871) L. R. 6 C. P. 486.
(6) (1811) 4 Taunt. 52; 13 R. R. 557.
(7) (1864) 15 C. B. (N.S.) 754.
(8) (1830) 1 B. & Ad. 118; 35 R. R. 239.
(9) (1883) 11 Q. B. D. 782.
(10) (1811) 13 East, 565; 12 R. R. 442.
(11) (1854) 10 Ex. 28.
(12) (1886) 18 Q. B. D. 67.
(13) (1888) 20 Q. B. D. 475.
(14) [1894] 1 Q. B. 612.
(15) (1880) 5 C. P. D. 171.

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cases: *Cock* v. *Taylor* (1); *Moorsom* v. *Kymer* (2); *County of Lancaster SS. Co.* v. *Sharp.* (3)]

Leck, in reply.

Cur. adv. vult.

April 2. The following written judgment was delivered by

BIGHAM J. [The learned judge, after stating the facts as above, proceeded:—] There are only two ways in which a promise can possibly arise on the part of the defendants to pay freight to the plaintiff. It can arise out of the bill of lading itself, or it can arise by implication from the delivery of the goods by the plaintiff at the defendants' request. There can be no doubt that where a master signs a bill of lading without qualification, that is to say, without anything in the document to shew that he does so merely as agent, he makes himself personally liable upon it to the shipper. The shipowner who has authorized the master to sign the bill of lading is also liable upon it. The one liability arises out of the representation on the document that the master is a principal; the other liability arises out of the circumstance that in truth the master has signed for the shipowner. The master is estopped from denying the truth of the representation which he has made; in other words, he is not allowed to give evidence to discharge himself from a liability which he has apparently undertaken; and the shipowner is bound by the contract because it has been entered into on his behalf and with his authority. Thus two separate liabilities are created for the performance of one contract. But no difficulty arises out of this state of things, for the shipper has not a concurrent remedy against both master and owner; he has merely a right to elect which of the two he will hold liable, and, having once finally elected, his remedy against the other is gone; and as either master or owner may be sued, so either may sue, for the existence of the liability on the one hand involves the existence of the correlative right on the other. These rules apply not merely

(1) (1811) 13 East, 399; 12 R. R. 378.

(2) (1814) 2 M. & S. 303; 15 R. R. 261.

(3) (1889) 24 Q. B. D. 158.

to contracts created by bills of lading, but to all simple contracts; they form part of the law relating to principal and agent.

Now, applying this law to the circumstances of the present case, one must look to see what it is that the master has signed. It is not a mere bill of lading in the ordinary form; it is a bill of lading which in express words incorporates all the terms of a charter already made between the master's owner and the charterers (the defendants); thus the two documents must be read as one, and it is to the contract so created that the plaintiff has put his signature. Then, reading the two documents together, does it appear that in signing he did so as agent merely, or does it appear that he did so as principal? By the charterparty the shipowner promises the defendants that his servant, the master, shall sign bills of lading as presented. Why is this provision inserted? It is inserted with two objects: first, to enable the charterers, in case they ship their own goods (as they did in this case), to obtain a negotiable instrument which they can transfer by indorsement, and on which, if need be, they can obtain money; and, secondly, it is inserted to enable them, in case they ship the goods of other people, to hand to such other people bills of lading which in their hands can serve a similar purpose and which shall express the freight they may have agreed to pay. These are the only objects with which the provision is inserted, and in my opinion the plaintiff, when he signed the bills of lading sued on, did so merely in order to effectuate the first of those purposes, and so to carry out the promise which his owner had made by the charterparty. I think this is the meaning to be put on the two documents when read together. It is neither apparent from the documents, nor is it the fact, that the captain or the charterers intended that a new contracting party should be introduced into the business by the signing of the bills of lading. It is not necessary to stop to consider what the effect might have been if the bills of lading had been indorsed to third parties so as to pass the property in the goods. Here the charterers, the shippers, the consignees, and the receivers of the cargo are one and the same, and the Bills of Lading Act has therefore no bearing on the case.

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Bigham J.

I come to the conclusion that the master's signature to the bills of lading must be read as the signature of a mere agent fixing a liability on his principal only; the master therefore could not be sued, and it follows as a consequence that he cannot sue.

A point was taken during the argument that the master could not be taken to have intended to contract, inasmuch as he had excluded himself by the contract from the consequences of his own barratry, and it was said that it was absurd to suppose that the man could have contracted upon such a footing. I am not disposed to attach much importance to that point, for I think it very likely that the clause in the bill of lading, which is different from the clause in the charterparty by which the liability of the persons signing the bill of lading in respect of his own barratry is excluded, is in the bill of lading per incuriam. It is part of the print, and was probably overlooked and not struck out at all. Therefore I am not disposed to place any importance on that point.

But it was said that the master is entitled to sue, if not on the bill of lading, at all events on an implied contract to pay the freight. It is said that the master held possession of the goods in order to enforce the shipowner's lien, and that he had given up the possession at the request of the defendants, who were, as I have said, the consignees and receivers of the cargo, and that it must be implied from the request, and from the fact that he had given up possession, that the defendants had promised to pay the freight. I do not think there is anything in that point. It was not at the request of the defendants to the master that the lien was parted with and possession of the goods given up. The application by the receivers for possession of the goods was made only to Messrs. Clarkson, who were the agents for the shipowners, and it was the shipowners through them who gave up possession at the receiver's request. I find as a fact that there was no request for possession made to the master, and that therefore no implied contract has arisen to pay him.

The question was argued as to what the position would be if the master stood in the relation in which the plaintiff con-

tended he did stand, that is, as principal on the contract. It was said that inasmuch as the charterparty contained a clause for cesser of liability, the defendants would not be liable to pay. I do not think this is right. The defendants would be liable in my opinion if the master could sue, and certainly would be liable if an action were brought by the shipowner for the freight mentioned in the bill of lading. I think the case of *Gullischen* v. *Stewart* (1) makes that clear. The bill of lading is supplemental to the charterparty, and creates the liability which but for the bill of lading would probably be gone, namely, the liability to pay the freight. The two documents which must be read together are in a sense a contract, but the bill of lading, which is the later document, I think overrides the charterparty and makes the defendants liable to pay the freight; but the person to sue in this case is in my opinion the shipowner and not the master. Therefore I think this action must be dismissed, and dismissed with costs.

Judgment for the defendants.

Solicitor for plaintiff: *Robert Greening.*
Solicitors for defendants: *J. White & Leonard.*

(1) 13 Q. B. D. 317.

W. J. B.

1901
May 2.

DUCK *v.* TOWER GALVANIZING COMPANY, LIMITED.
CALLUND, CLAIMANT.

Company—Debenture—Unauthorized Issue—Bonâ fide Holder for Value—Rights as against Execution Creditor.

The rights of a bonâ fide holder for value of a debenture, which is in proper form and charges all the property of the company as security for the debenture debt, prevail over those of an execution creditor, even where the debenture is issued without authority, no directors of the company having been appointed and no resolution to issue debentures passed; provided that the holder had no notice of any irregularity in the issue of the debenture.

APPEAL from the decision of the Southwark County Court.

One Restall carried on business in Bermondsey in galvanizing iron. On June 15, 1899, his assets amounted to about 100*l.* and his debts to a rather less amount. He on that date formed his business into a limited company, having procured his wife and five other persons to sign the memorandum of association, and the certificate of incorporation was issued the same day. The articles of association gave the company power to borrow money on debentures. From that date he carried on his business as the Tower Galvanizing Company, Limited, without any reference to the other signatories, neither consulting them nor calling them together. There were no meetings, statutory or otherwise, and no resolutions or minute-books. Callund, the claimant, who was a customer of Restall, between February 14 and April 27, 1900, advanced to the company sums amounting to 519*l.* on the security of what purported to be a debenture of the company for 500*l.* The debenture was executed on April 23, 1900, by Restall and his wife as directors of the company, and bore a seal with the name of the Tower Galvanizing Company, Limited. The debenture was on a printed form, and purported to charge with the payment of the principal sum of 500*l.* and interest thereon at the rate of 25 per cent. per annum "all its property whatsoever and wheresoever both present and future,

including its uncalled capital for the time being." It was issued subject to the conditions indorsed thereon, among which were the following: "This debenture is one of a series of debentures of the company for securing principal sums not exceeding in the aggregate the sum of 600*l*. The debentures of the said series are all to rank pari passu as a joint charge on the undertaking of the company without any priority one over another, and such charge is to be a floating security, but so that the company is not to be at liberty to create any mortgage or charge on any of its property in priority to the said debentures." . . . .

"The principal moneys hereby secured shall immediately become payable (*a*) if the company makes default for a period of six calendar months in the payment of any interest hereby secured, and the registered holder hereof, before such interest is paid, by notice in writing to the company call in such principal moneys; (*b*) if an order be made or an effective resolution be passed for the winding-up of the company." . . . .

"The security hereby made shall become immediately enforceable and the principal moneys and interest shall immediately become payable (*c*) if a distress or execution shall be levied upon or enforced against any of the goods or property of the company, or a receiver thereof shall be appointed by the holder of this debenture; (*d*) or if the total value at cost prices of the stock-in-trade of finished and unfinished goods and raw material shall fall below the total amount for the time being paid for debenture bonds, or by any other encumbrance on such property."

"At any time after the security of this debenture becomes enforceable the registered holder of this debenture may appoint by writing any person to be a receiver of the property charged by this debenture, and a receiver so appointed shall have power to take possession of the property charged by this debenture and to carry on the business of the company, and all moneys received and expended by such receiver shall be accounted for to the holder of this debenture."

It was admitted that the claimant had no knowledge that the debenture was issued without authority, and that he had

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no notice of any irregularities in the circumstances under which it was issued.

On November 14 the plaintiff Duck, having obtained judgment against the company, put in an execution, and, as Callund claimed under his debenture, the sheriff interpleaded; and the interpleader issue was remitted for trial to the Southwark County Court. The learned county court judge held that the debenture was invalid, and gave judgment for the execution creditor.

Callund, the claimant, appealed.

Joseph Sharpe, for the claimant. The county court judge was wrong. The debenture bond being in proper form, the claimant had a right to presume that there had been a resolution authorizing the borrowing of the money and the issue of the debenture: *Royal British Bank* v. *Turquand* (1); *Mahony* v. *East Holyford Mining Co.* (2); *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.* (3) Where the seal of a company is affixed without any resolution of the directors, but by direction of the persons having the chief management of the company, it must be taken to have been affixed by due authority: *In re Barned's Banking Co.* (4) Persons dealing with the managing director of a company are entitled to assume that he has all such powers as he purports to exercise: *Biggerstaff* v. *Rowatt's Wharf.* (5) [He also referred to *Salomon* v. *Salomon* (6); *Totterdell* v. *Fareham Brick Co.* (7); *In re County Life Assurance Co.* (8)]

Assuming the validity of the debenture, it will prevail against the execution creditor: *In re Standard Manufacturing Co.* (9); *In re Opera, Limited* (10); *Davey & Co.* v. *Williamson & Sons.* (11)

Cannot, for the execution creditor. This is an extreme case, and the Court will not go so far as to say that where a

(1) (1856) 6 E. & B. 327.
(2) (1875) L. R. 7 H. L. 869.
(3) [1895] 1 Ch. 629.
(4) (1867) L. R. 3 Ch. 105.
(5) [1896] 2 Ch. 93.
(6) [1897] A. C. 22.
(7) (1866) L. R. 1 C. P. 674.
(8) (1870) L. R. 5 Ch. 288.
(9) [1891] 1 Ch. 627.
(10) [1891] 3 Ch. 260.
(11) [1898] 2 Q. B. 194.

so-called debenture has been issued without any authority at all it will prevail against the rights of the execution creditor. No directors of this company were ever appointed, and, therefore, none of its proceedings were valid: *In re London and Southern Counties Freehold Land Co.* (1); Companies Act, 1862 (25 & 26 Vict. c. 89), Table A, 52 and 53. All the cases that have been cited proceed on some informality in the issue of the debentures. Here there is not informality, but absolute invalidity. Restall usurped authority to act for the company and to hold himself out as managing director. The debenture is, therefore, of no force at all. Where the seal of a company is affixed without lawful authority, the company is not liable: *D'Arcy* v. *Tamar, Kit Hill and Callington Ry. Co.* (2)

Joseph Sharpe was not called upon to reply.

LORD ALVERSTONE C.J. In this case an interpleader issue has been ordered between the holder of a debenture and an execution creditor. That the debenture, if valid, undoubtedly creates a charge on the assets of the company is now well established ever since *In re Standard Manufacturing Co.* (3) and *In re Opera, Limited* (4), which deal with the rights of debenture-holders in regard to companies, and decide that such charges prevail as against an execution creditor, if the debenture is valid. The learned county court judge has held that there was no evidence of any wrongful act on the part of the debenture-holder that could invalidate the debenture. This being so, he has in my opinion gone too far in deciding against him. He has found that the debenture-holder acted in good faith, and without notice of the circumstances under which the debenture was issued. He has further found that the debenture-holder advanced money to the amount of 519*l.*, and that he received in respect of such advance the debenture in question. I asked counsel for the execution creditor whether there was any decided case in which it had been held that informality would destroy the rights of a bonâ fide debenture-holder—of the holder of a debenture that was

(1) (1885) 31 Ch. D. 223.
(2) (1867) L. R. 2 Ex. 158.
(3) [1891] 1 Ch. 627.
(4) [1891] 3 Ch. 260.

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upon the face of it valid. He has fairly stated that he could find no such case, unless it be *D'Arcy* v. *Tamar, Kit Hill and Callington Ry. Co.* (1) On the other hand, from the case of *Royal British Bank* v. *Turquand* (2) down to *Mahony* v. *East Holyford Mining Co.* (3) in the House of Lords, it has always been held that it is not incumbent on the holder of such a document purporting to be issued by a company to inquire whether the persons pretending to sign as directors have been duly appointed. Those cases were followed by the Court of Appeal in *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.* (4); so that there has been ample authority to shew that no informality will alter the rights possessed by a bonâ fide holder for value upon a document that purports to be in order. In this case the seal of the company was affixed, and the debenture purports to be signed, by two directors. It is not contended that there is anything in Table A of the Companies Act, 1862, that would make the debenture an invalid document. The memorandum of association allowed the company to borrow money on debentures, and the articles of association of the company might very well have justified the issuing of such a debenture as this; and the objections which the county court judge has held to be fatal are merely objections as to formalities which ought to have been observed. I think that in this case, therefore, the learned judge was wrong, and that he ought to have given judgment for the claimant.

LAWRANCE J. I agree.

Appeal allowed.

Solicitor for claimant: *B. Walker Kemp.*
Solicitor for execution creditor: *Charles Turner.*

(1) L. R. 2 Ex. 158.
(2) 6 E. & B. 327.
(3) L. R. 7 H. L. 869.
(4) [1895] 1 Ch. 629.

A. P. P. K.

BARNETT *v.* MAYOR, &c., OF POPLAR.

1901
May 2.

Tramway Company—Liability for Damage from Non-repair of Road—Contract with Road Authority — Transfer of Liability — Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *ss.* 28, 29.

Where a tramway company has entered into a contract with the road authority under s. 29 of the Tramways Act, 1870, whereby that authority has undertaken the repair of the portion of the road which, under s. 28, the tramway company were bound to repair, the liability for injuries occasioned through non-repair of such portion of the road to persons using the same is transferred to the road authority.

APPEAL from the Bow County Court.

On September 6, 1900, the plaintiff's van, while proceeding along the Bow Road, struck against the rail of the tramway belonging to the North Metropolitan Tramways Company and sustained injury. It was alleged that the rail projected an inch and a half above the level of the street owing to failure on the part of the defendants to keep the street in proper repair.

By s. 28 of the Tramways Act, 1870 (33 & 34 Vict. c. 78), tramway companies are bound to maintain and keep in good condition and repair in such manner as the road authority shall direct so much of the road as lies between the rails of the tramway, and for eighteen inches beyond the rails on each side of the tramway; and by s. 29, "The road authority on the one hand and the promoters on the other hand may from time to time enter into and carry into effect . . . . contracts, agreements, or arrangements with respect to the . . . . keeping in repair of the whole or any portion of the roadway of any road on which the promoters shall lay any tramway." Under this section the North Metropolitan Tramways Company had contracted with the defendants as the road authority that they should keep that part of the road, for which the tramways company was responsible under s. 28, in proper repair.

The plaintiff brought this action in the county court for damages for the injury to the van, and put in the contract

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between the tramway company and the defendants, but the judge nonsuited the plaintiff.

The plaintiff appealed.

Abinger, for the appellant. The county court judge was wrong. In *Howitt* v. *Nottingham Tramways Co.* (1) it was laid down that, where there was an agreement under s. 29 of the Tramways Act, 1870, that the road authority should keep the part of the road occupied by the tramway in repair, the liability was transferred to the road authority. That case was upheld by the Court of Appeal in *Alldred* v. *West Metropolitan Tramways Co.* (2)

Chester Jones, for the respondents. No action will lie against a local authority for non-repair of a highway: *Cowley* v. *Newmarket Local Board* (3), and there is no provision in the Tramways Act, 1870, which makes a road authority liable even where it has contracted to keep the roadway in repair. The respondents, therefore, are not liable: *Municipality of Pictou* v. *Geldert.* (4) In *Howitt* v. *Nottingham Tramways Co.* (1) and *Alldred* v. *West Metropolitan Tramways Co.* (2), the only thing decided was that the tramways company was not liable where the road authority had contracted to do the repairs, and the opinion expressed by Lord Coleridge C.J. in the former case that the road authority was liable under such circumstances was obiter, and was not indorsed by the Court of Appeal in the latter case.

LORD ALVERSTONE C.J. I think that in this case the learned county court judge has been premature in nonsuiting the plaintiff. But for the decisions in *Howitt* v. *Nottingham Tramways Co.* (1) and *Alldred* v. *West Metropolitan Tramways Co.* (2), there would have been a great deal that could be said in favour of the view that the action could be brought against the tramways company. But in *Howitt* v. *Nottingham Tramways Co.* (1) it was laid down that where, as here, the tramway company enters into a contract with the road authority under s. 29 of the Tramways Act, 1870, and the road

(1) (1883) 12 Q. B. D. 16.
(2) [1891] 2 Q. B. 398.
(3) [1892] A. C. 345.
(4) [1893] A. C. 524.

authority undertakes the repair of that portion of the road on which the tramway is laid, the tramway company is exonerated from liability, and Lord Coleridge C.J. expressed a strong opinion that the liability was transferred to the road authority. It is said that that opinion was not necessary to the judgment. In one sense it was not; but it seems to me very material to it, because it would be a very strong thing to say that, where such a state of things exists, there is no liability that can be enforced against any one to keep this part of the road in repair. That would be the result if the tramway company could get rid of their liability without transferring it to the road authority. In *Alldred* v. *West Metropolitan Tramways Co.* (1), *Howitt* v. *Nottingham Tramways Co.* (2) was reviewed by the Court of Appeal, who affirmed the decision. The Court of Appeal, therefore, had before it the opinion expressed by Lord Coleridge C.J., that in such a case the liability was transferred to the road authority; and if they had disagreed with that opinion, one would certainly expect to find something about it in the judgment. Primâ facie, therefore, the action will lie against the road authority, and I think that the county court judge was wrong in nonsuiting the plaintiff. The case must, therefore, go back for a new trial.

LAWRANCE J. I agree.

Appeal allowed.

Solicitor for appellant: *Frederick George.*

Solicitor for respondents: *C. G. Bradshaw.*

(1) [1891] 2 Q. B. 398. (2) 12 Q. B. D. 16.

A. P. P. K.

1901
May 7.

DRURY *v.* NORTH EASTERN RAILWAY COMPANY.

Railway—Negligence—Passenger—Closing of Carriage Door.

Where a passenger is seated in a railway carriage, the fact that his finger is crushed owing to the shutting of the carriage door by a railway servant on the platform is not evidence of negligence in an action against the railway company.

There is no duty cast upon the servants of a railway company to give warning of the shutting of a carriage door to passengers who are actually seated inside the carriage and are not in the act of getting in or out of it.

APPEAL from a decision of the judge of the Howden County Court.

The action was brought to recover damages for injuries received by the plaintiff while a passenger on the defendants' line of railway. The evidence shewed that the plaintiff, a season ticket-holder, was travelling from Goole to Hull, and was seated on the side of the carriage next to the platform. At Saltmarsh, the first station after leaving Goole, another passenger got out of the carriage, leaving the carriage door open; the station-master, in shutting the door, crushed the plaintiff's finger, which was in the hinge. It was admitted that the station-master gave no warning before shutting the door, but there was no evidence whether the train was actually in motion at the time that the door was shut. The learned county court judge was of opinion that there was evidence of negligence, because no warning had been given that the doors were about to be closed, and gave judgment for the plaintiff with 10*l.* damages. The defendants appealed.

Simey, for the defendants. There was no evidence of negligence on the part of the station-master. Since the decision of *Metropolitan Ry. Co.* v. *Jackson* (1) it cannot be successfully contended that the mere shutting of the door of a railway carriage is evidence of negligence. The question of the duty of giving warning of the shutting of the door was dealt with

(1) (1877) 3 App. Cas. 193.

by Lindley J. in *Maddox* v. *London, Chatham and Dover Ry. Co.* (1), and was decided in favour of the railway company. The cases in which there has been held to be negligence on the part of the company are all cases where the passenger was not fully in the carriage at the time of the accident, or had not fully completed the operation of getting in or getting out; no case has ever gone the length of finding negligence on the part of the company's servant where the passenger has been seated in the carriage at the time such an accident happened. [He also cited *Bullner* v. *London, Chatham and Dover Ry. Co.* (2)]

Walter Stewart, for the plaintiff. There was evidence of negligence. Warning should have been given to the occupants of the carriage before shutting the door: *Atkins* v. *South Eastern Ry. Co.* (3)

[LORD ALVERSTONE C.J. That was a totally different case: the passenger was holding on to the door in the act of sitting down.]

The arrangement of the door was in the nature of a trap, and no precautions were taken to see that the passenger was in no danger; the hinge side of the door should have been, as is the case in the railway carriages of some companies, protected by a guard.

LORD ALVERSTONE C.J. I am clearly of opinion that this appeal must be allowed; the difficulties in the way of the plaintiff are too great to be successfully surmounted. There was no suggestion at the trial that the carriage in which the plaintiff was riding was not roadworthy; of course, a railway company is bound to supply a roadworthy carriage, but the point does not arise. The only point we have to consider is whether, in the case of a passenger who is seated in a railway carriage in the course of the journey, not in the act either of entering the train or alighting from it, there is evidence of negligence against the railway company because the shutting of the carriage door by a servant on the platform jams the

(1) (1878) 38 L. T. 458. (2) (1885) 1 Times L. R. 534.
(3) (1885) 2 Times L. R. 94.

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passenger's finger. Speaking for myself, I should certainly say that no railway servant could be supposed to assume that a passenger's finger was placed in a dangerous position unless the passenger was in the act of getting in or out of the carriage. It is said on behalf of the plaintiff that no warning was given by the station-master before he shut the door; but we cannot close our eyes to the ordinary incidents of railway travelling, and it is difficult to see what warning could be given under such circumstances; the warning would have to be given with reference to an act which the passenger of course might conceivably do, but which he most certainly ought not to do. Not only upon authority, but also upon grounds of common sense, I am of opinion that to hold a railway company liable for negligence on the ground that no warning of the shutting of the carriage door was given to passengers seated inside the carriage, and not in the act of getting in or out, would be to reduce the law to an absurdity. There was, therefore, in my opinion no evidence of negligence, and the appeal must be allowed and judgment entered for the defendants.

LAWRANCE J. I am of the same opinion.

Appeal allowed.

Solicitors for plaintiff: *Indermaur & Brown, for Drewry, Goole.*

Solicitor for defendants: *A. K. Butterworth.*

W. J. B.

ROBINSON *v.* FAWCETT & FIRTH.

1901
May 4.

County Court—Jurisdiction—Application for New Trial—Power to enter Judgment—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 93.

A county court judge has no jurisdiction, on an application for a new trial of an action tried in the county court, to enter judgment for the applicant.

MOTION for a prohibition to the county court of Dewsbury.

An action was brought in the county court by the plaintiff to recover damages from the defendants for personal injuries sustained by him while lawfully on the premises of the defendants. The action was tried before the county court judge without a jury on December 11, 1900, and judgment was given for the plaintiff for 50*l*. The defendants applied to the judge for a new trial, and, on the application coming before him, he set aside the judgment for the plaintiff and entered judgment for the defendants.

The plaintiff now moved for a prohibition to the county court judge.

Compston, for the plaintiff. The county court judge was wrong. He had no jurisdiction to enter judgment for the defendants. His power is strictly limited by s. 93 of the County Courts Act, 1888 (1), and the utmost that he could do was to order a new trial. He has no power to review his own judgment even on a point of law when once it has been delivered: *Irving* v. *Askew*. (2) He can only grant a new trial under the same limitations as to grounds as prevail in the High

(1) By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 93, "Every judgment and order of the Court, except as in this Act provided, shall be final and conclusive between the parties, but the Court shall have power to nonsuit the plaintiff in every case in which satisfactory proof shall not be given entitling either the plaintiff or defendant to judgment. The judge shall also in every case whatever have the power, if he shall think just, to order a new trial to be had upon such terms as he shall think reasonable, and in the meantime to stay the proceedings."

(2) (1870) L. R. 5 Q. B. 208.

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Court: *Murtagh* v. *Barry* (1); and he cannot grant a new trial merely because he is dissatisfied with his own decision: County Court Rules, 1889, Order XXXI.; *Simpson* v. *Earlam*. (2).

Lowenthal, for the defendants. The county court judge had jurisdiction on an application for a new trial to enter judgment for the defendants. He has the same power in this regard as the High Court, which under Rules of Supreme Court, 1883, Order XL., r. 10, on an application for a new trial, may enter judgment for either party. By s. 164 of the County Courts Act, 1888, the general principles of practice in the High Court may be adopted and applied to actions and matters in the county court.

LORD ALVERSTONE C.J. I am of opinion that the learned county court judge had no right to do what he did in this case. He had no jurisdiction, on an application to him for a new trial, to alter the judgment which he had given for the plaintiff and enter judgment for the defendants. The matter is fully dealt with in s. 93 of the County Courts Act, 1888, which provides that every judgment and order of the Court shall be final and conclusive between the parties except in certain specified cases.

The practice in the High Court as to entering judgment on appeal or on an application for a new trial has no bearing on proceedings in the county court, and the only power that the county court judge had was to order a new trial; and therefore I think this prohibition must be granted.

LAWRANCE J. I agree.

Order accordingly.

Solicitors for plaintiff: *Walker & Rowe, for Blakeley & Clough, Dewsbury.*

Solicitors for defendants: *James & Co., for Learoyd & Co., Huddersfield.*

(1) (1890) 24 Q. B. D. 632. (2) (1896) 40 Sol. J. 227.

A. P. P. K.

LAW, APPELLANT; GRAHAM AND ANOTHER, RESPONDENTS. 1901 *May* 3.

Factory Acts—"Factory," what is—Premises used for Adapting Articles for Sale—Mechanical Power used "in aid of" Manufacturing Process—Process of Bottling Beer and Washing Bottles—Factory and Workshop Act, 1878 (41 & 42 *Vict.* c. 16), *s.* 93.

By s. 93 of the Factory Act, 1878, the expression "non-textile factory" means, inter alia (sub-s. 3 (*c*)), any premises wherein any manual labour is exercised by way of trade or for the purposes of gain "in or incidental to the adapting for sale of any article, and wherein, or within the close or curtilage or precincts of which, steam, water, or other mechanical power is used in aid of the manufacturing process carried on there."

The respondents occupied premises which they used solely for the purpose of washing bottles and bottling beer in their trade of wholesale and retail beer dealers. Before the bottles were filled with beer, which was done by manual labour only, they were washed inside by a rotary brush driven by a small gas-engine, the bottles being held in position by hand:—

Held, upon the facts above stated, that the respondents' premises were not a "factory" within the definition in s. 93, sub-s. 3 (*c*).

CASE stated, under the Summary Jurisdiction Acts, by two justices of the city of Newcastle-upon-Tyne.

At a court of summary jurisdiction held for that city the respondents appeared to answer an information preferred against them by the appellant, an inspector of factories, charging that they, being the occupiers of certain bottling works within the city, the same works being a "factory" within the meaning of the Factory and Workshop Acts, 1878 to 1895, did fail to have affixed at the entrance of the factory in the prescribed form the prescribed abstract of the said Acts. (1)

(1) Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16), s. 93 (after defining the expression "textile factory"): "The expression 'non-textile factory' in this Act means . . . .—

"(3.) Any premises wherein, or within the close or curtilage or precincts of which, any manual labour is exercised by way of trade or for purposes of gain in or incidental to the following purposes or any of them; that is to say,

"(*a*) in or incidental to the making of any article or of part of any article, or

"(*b*) in or incidental to the altering, repairing, ornamenting, or finishing of any article, or

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The following facts were proved or admitted on the hearing of the information, and were stated in the case:—

1. The respondents were the occupiers of the premises referred to in the information, which they used solely for the purpose of washing bottles and bottling beer in their trade of wholesale and retail beer dealers.

2. Before the bottles were filled with beer, which was done by manual labour alone, they were washed by manual labour with the aid of mechanical power. The bottles were washed inside by a rotary brush driven by a small gas-engine, and were held in position by hand. The washing of the outside of the bottles was effected by manual labour only.

3. Nothing was done to the beer itself to in any way alter its nature or character for the purpose of adapting it for sale.

4. No process of any kind, manufacturing or otherwise, was carried on on the said premises beyond that of washing bottles and bottling beer, as already described.

5. The respondents had not the prescribed abstract of the Factory Acts fixed at the entrance of their premises in the prescribed form.

6. If the premises came within the definition of a "factory" under the Factory Act, 1878, s. 93, sub-s. 3 (*c*), then the respondents had infringed the provisions of s. 78 of that Act.

The justices dismissed the information on the ground that the respondents' premises were not a "factory" within the meaning of the definition of that term in s. 93 of the Factory Act, 1878.

The question for the opinion of the Court was whether they were right in so dismissing it, and, if not, what should be done in the premises.

Henry Sutton, for the appellant. The justices ought to have convicted. The respondents' premises were a "factory" within

"(*c*) in or incidental to the adapting for sale of any article,

and wherein, or within the close or curtilage or precincts of which, steam, water, or other mechanical power is used in aid of the manufacturing process carried on there.

"The expression 'factory' in this Act means textile factory and non-textile factory, or either of such descriptions of factories."

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s. 93 of the Factory Act, 1878. The process of putting the beer into bottles is "in or incidental to the making of an article"—namely, bottled beer—within sub-s. 3 (*a*) and the concluding words of that sub-section. At any rate, it is within clause (*c*), as being "in or incidental to the adapting for sale" of the article. The gas-engine is used "in aid of" the process within the meaning of the concluding words of sub-s. 3. In the Scottish case of *Petrie* v. *Weir* (1), which is analogous, the premises in question consisted of a yard, in which stones were dressed by manual labour, and included an engine-house where the workmen's tools were sharpened on a grindstone driven by a gas-engine. The Court held that the premises were a "factory" within the meaning of the Act of 1878, sub-s. 3. In the present case the justices thought that the decision in *Spencer* v. *Livett, Frank & Son* (2) was in point; it has, however, no application here.

Travers Humphreys, for the respondents. The decision of the justices was right. The facts stated in the case do not bring the respondents' premises within any of the definitions of a "non-textile factory" in s. 93. Those definitions all refer to processes whereby raw material is turned into a finished article. Sect. 93, sub-s. 1, refers to the works, &c., named in Part I. of the 4th schedule, which are all manufactories in the ordinary sense. Sub-s. 2 refers to the premises or places named in Part II. of the 4th schedule—hat works, rope works, &c.—"wherein, or within the close or curtilage or precincts of which, steam, water, or other mechanical power is used in aid of the manufacturing process carried on there." Sub-s. 3 is intended to bring in other premises not previously specified; but, again, in order to bring premises within the definition, there must be the use of steam, water, or other mechanical power "in aid of the manufacturing process carried on there." The pouring of beer —a finished article—into bottles is not a manufacturing process at all, and the use of the gas-engine for the purpose of washing the bottles is not a use of mechanical power "in aid of" any manufacturing process.

[He was stopped.]

(1) (1900) 2 F. 1041. (2) [1900] 1 Q. B. 498.

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LORD ALVERSTONE C.J. This is one of those cases which are very near the line. If one could find some general object of the Act to guide us to the conclusion that we ought to give the words of the definition a very wide interpretation, I think it would be possible in many cases to bring processes within those words as "factories," to which processes, at first sight, the words might seem not intended to apply. We have not, however, any real guide of that kind here; we have to take s. 93 as it stands. If the case before us is to be brought within the definition of that section at all, it must, I think, satisfy two conditions; it must come within one of the clauses (*a*), (*b*), or (*c*) of sub-s. 3, and within the words which follow clause (*c*) at the end of that sub-section. I think it is plain that bottling beer is not a process incidental to the "making of an article or part of an article" within clause (*a*); nor to the "altering, repairing, ornamenting, or finishing of any article" within clause (*b*). I doubt if it can be said to be "in or incidental to the adapting for sale of any article" within clause (*c*); but I think it is possible, if that clause stood alone, to take the view that where casks of beer are brought in wholesale and bottles provided, the putting the beer into the bottles might, by a somewhat strained construction of the words, be said to be an adapting of the article for sale. Then, assuming that the condition of clause (*c*) is satisfied, you have to construe the additional words, "And wherein, or within the close or curtilage or precincts of which, steam, water, or other mechanical power is used in aid of the manufacturing process carried on there." I am of opinion that, having regard to the earlier part of s. 93, and to the provisions with respect to manufacturing processes and to the 4th schedule, the washing of the bottles by mechanical means cannot be fairly called a process which is used "in aid of" the bottling of the beer. It is true that the bottles must be clean, and that the respondents wash them because they are going to put beer into them; but, in my opinion, that operation is not "in aid of" in the sense in which those words are used in the section. Therefore, though the case is near the line, I think the justices were right. With regard to *Petrie* v. *Weir* (1), I do

(1) 2 F. 1041.

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not wish to be thought to dissent from that decision, because there, in a sense, the actual condition of the tools might have a great deal to do with the dressing of the stone for sale. Whether or not I should have decided the case the same way I need not now consider; but I do not, in what I have said, intend to dissent from the decision, because I think a distinction may be drawn between it and the case now before us. I am of opinion that the justices were right, and our judgment should be in favour of the respondents.

LAWRANCE J. concurred.

Judgment for the respondents.

Solicitor for appellant: *Solicitor of the Treasury*
Solicitors for respondents: *Pyke & Parrott.*

W. A.

In re THOMAS TOWNSEND, DECEASED.

1901
May 7.

Revenue—Estate Duty—Property passing on Death of Deceased—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1.

A testator who died before the commencement of the Finance Act, 1894, by his will bequeathed his real and personal estate to trustees for sale and investment, and for payment out of the annual income thereof of an annuity to his wife, and, subject to the annuity, to his eight children equally, and after the death of his wife to divide the trust fund among the children in equal shares; but if the fund exceeded a certain specified sum, then to divide eight-ninths of such excess among the children, and to pay the remaining ninth to certain other persons. The wife died after the Finance Act, 1894, had come into operation:—

Held, that estate duty was only payable on the one-ninth share of the excess of the trust fund over the specified sum and on the benefit which accrued to the children by the cesser of the annuity, since that was the only property passing on the death of the wife.

PETITION.

Thomas Townsend, of Attleborough, in the county of Warwick, deceased, by his will bearing date December 5, 1891, after appointing the petitioners, Charles Benjamin Townsend

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and Joseph Fielding Johnson, executors and trustees thereof, and after giving certain specific legacies therein mentioned, devised and bequeathed to the petitioners all his real estate and the residue of his personal estate, upon trust for sale and collection and investment of the proceeds in manner therein provided, and for payment out of the annual income to arise from such investment to the testator's wife during her life of an annuity of 500*l.*, and, subject to the said annuity, to pay the said annual income unto and in equal shares between the testator's eight children in the said will named. And upon trust after the decease of the testator's wife as to 9600*l.*, part of the said trust fund (and if the same exceeded 9600*l.*, then also as to eight ninth parts of such excess), for and the said testator gave the same unto his said eight children in equal shares. And if the said trust fund should exceed the sum of 9600*l.*, then as to the remaining ninth part of such excess for and the said testator gave the same unto the children of his deceased son Isaac Thomas Townsend equally between them.

The testator died on January 10, 1892, without having revoked or altered this will, and the same was proved by the petitioners on March 28, 1892.

At the time of his death the testator was possessed of personal estate of the gross value of 21,413*l.* 6*s.* 8*d.*, and upon proving the will probate duty and estate duty payable under the Customs and Inland Revenue Act, 1889, were duly paid in respect thereof.

The testator was also possessed of real estate which at the date of his death was of the estimated principal value of 9353*l.* 11*s.*, and was, pursuant to directions in that behalf contained in his said will, sold to two of his said children for the sum of 8500*l.*

On June 21, 1893, the petitioners paid to the Commissioners of Inland Revenue the sum of 118*l.* 8*s.* 10*d.*, being succession duty at the rate of 1½ per cent. upon the estimated principal value of the said real estate after deducting the share of one son of the testator which, in events which happened, passed to the widow of the testator, and deducting

also the value of the annuity given to the testator's widow by the will.

The testator's widow died on May 29, 1900.

The Commissioners of Inland Revenue now claimed that upon the death of the widow the entirety of the trust estate of the testator passed to his children within the meaning of the Finance Act, 1894, and that estate duty became and was payable upon such part thereof as was attributable to the real estate of the testator, subject to an appropriate allowance in respect of the succession duty already paid.

The petitioners contended that upon the true construction of the will all the trust estate of the testator (except one-ninth of the excess thereof over 9600*l.*), subject to the widow's annuity, passed to his children at his death, and not upon the death of the widow, and that the only property which upon the death of the widow passed under the will of the testator was the one-ninth share of the excess of the trust fund of the testator over 9600*l.*, and the benefit which accrued to the eight children of the testator by the cesser of the annuity given to the widow by the will. They therefore prayed that the Commissioners might be directed to assess the estate duty payable in respect of the property accordingly.

By the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2, sub-s. 1, "Property passing on the death of the deceased shall be deemed to include . . . . (*b*) property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cesser of such interest."

Montague Lush, for the petitioners. As the personalty has paid probate duty, it is admittedly only the realty that is in question. That is not property passing on the death of the widow. The whole property passed on the death of the testator, subject to the annuity to the widow, and with the exception of one-ninth of any excess there might be over 9600*l.*, and it is only on that that estate duty is payable.

The Attorney-General (*Sir R. B. Finlay, K.C.*) and *Vaughan Hawkins*, for the Crown. The will does not dispose of the

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property during the wife's life. Until the death of the widow it was impossible to ascertain whether there would be an excess over 9600*l.* or not, and therefore until that date the property did not pass, as the class who was to take on the death of the wife could not be ascertained till then. The effect of the provision is, therefore, to put the whole property in settlement until the death of the widow.

[They referred to Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21, sub-s. 2; Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 32; 36 Geo. 3, c. 52, s. 12; *In re Greenwood* (1); *Salmon* v. *Green* (2); *Earl Cowley* v. *Inland Revenue Commissioners.* (3)]

KENNEDY J. In this case I think the claim clearly succeeds. It seems to me that the contention which is set up by the petitioners is right, namely, that the trust estate save as to the one-ninth, the excess over 9600*l.*, passed, subject to the widow's annuity, upon the death of the testator. If it passed upon the death of the testator, then this claim of the taxing authority, so far as it is resisted by the petitioner, is a bad claim. The petitioner is willing enough to submit to the claim for estate duty in respect of the benefit which is got by the cesser of the annuity and in respect of so much of the trust fund as represents the excess of the trust fund over 9600*l.* As to that amount there is no resistance to the claim. My difficulty really is that I am puzzled to understand how the Crown maintains this contention, and I have a great difficulty in seeing how the contention can logically be put. There is no question that, looking to the substance of the disposition which is in question, as to 9600*l.* the children took an interest on the death of the testator which was quâ that sum a definite ascertained profit which vested in them, and as to which each of the eight children got his eighth share. Of course the whole estate was subject to the annuity, but the only uncertainty in case of the residue was as regards the amount of anything beyond 9600*l.* It is not until the death of the widow that the residue over

(1) (1869) 21 L. T. (N.S.) 25. (2) (1849) 18 L. J. (Ch.) 166.
(3) [1899] A. C. 198.

9600*l.* passes to the children and the grandchildren in the way provided for by the will. Therefore, if it does not pass until then, it cannot be ascertained until then, for it cannot be known until then that there will be any such residue. Otherwise the matter seems quite clear. The property as regards the 9600*l.* was property which passed on the death of the testator, and not on the death of the testator's widow, and therefore is not liable to this claim to the extent of the eight-ninths.

PHILLIMORE J. I am of the same opinion. When one once gets to read the will quietly, the thing is as plain as possible. There is only one peculiarity, and that not a very grave one, in the will. The testator has left an annuity to his wife; he has disposed of the balance of the income, if any, by giving it to his eight children, and at the death of his wife he has given eight legacies (total, 9600*l.*) to his eight children, and then he has given the residue over and above 9600*l.* The will contemplates the possibility of there being no residue. If, however, there was property enough to give the annuity to his wife of five hundred a year, unless it became necessary to trench largely upon the capital, there would be an ample residue. But the only peculiarity in the will is that it does not give the ninth sharer in the residue any share during the wife's life; otherwise the thing is, as I say, quite simple: annuity; gift of the balance of the income to eight persons; at the death of the annuitant legacies to those eight persons to the amount of 9600*l.*; the remainder divided in nine shares, eight of them going to these same eight persons.

It seems to me obvious that, as regards the legacies and as regards eight-ninths of the residue, or, as the legacies go to the same people, we may say as regards eight-ninths of the property, it passed at once to the children subject to the burden of the annuity; and if Mr. Thomas Townsend had died in the year of grace 1900 or 1901, and these had been, not children, but nephews or great-nephews liable to pay legacy duty, I do not think the Inland Revenue officials would willingly have accepted the suggestion that legacy duty would not become payable until after the death of his widow.

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If the contention put forward in this case by the Crown were to prevail, it would occasion much loss to the revenue.

Petition allowed.

Solicitors for petitioners: *Crowders, Vizard & Oldham, for Browetts, Coventry.*

Solicitor for the Crown: *The Solicitor of Inland Revenue.*

A. P. P. K.

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May 8.

THE MARQUESS OF BRISTOL *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp—Conveyance on Sale—Family Arrangement.

By two deeds made between B. and H. (who was the heir to B.'s settled estates), after reciting that H. had undertaken the payment of the mortgages on the estates, and that B. was indebted to H. in certain sums, it was witnessed that in pursuance of a family arrangement B. conveyed to H. his unsettled estates subject to the mortgages, and also certain specified chattels; but power was reserved to B. and H. to cancel, alter, or make void the family arrangement at any time:—

Held, that the deeds were conveyances on sale, and were chargeable with ad valorem stamp duty.

CASE stated by the Commissioners of Inland Revenue under s. 13 of the Stamp Act, 1891.

On December 8, 1899, three deeds were presented on behalf of the Marquess of Bristol to the Commissioners for their opinion as to the stamp duty with which those instruments were chargeable.

On December 6, 1899, the Marquess was entitled absolutely to certain freeholds and copyholds, and to valuable personal chattels. The freeholds and copyholds were subject to certain mortgages which had, by virtue of an instrument dated December 31, 1898, been consolidated into one charge of 62,000*l*. The Marquess was also tenant for life of certain other freeholds and copyholds, with remainder (in default of male issue born to him) to Captain Frederick William Fane Hervey as to the freeholds in tail male, and as to the

copyholds to uses corresponding thereto. On December 6, 1899, the Marquess was indebted to Captain Hervey in the sum of 123,800*l.* for moneys which Captain Hervey had expended at his request.

The deeds were as follows:—

1. A deed marked A, dated December 6, 1899, being a deed of arrangement, to which the mortgagees were parties, exonerating the Marquess from payment of the mortgage debt of 62,000*l.*, and containing a covenant by Captain Hervey with the mortgagees for payment of the same. The assessment of duty on the deed was not in question.

2. A deed marked B, dated December 6, 1899, and made between the Marquess of the first part and Captain Hervey of the other part, by which, after reciting that the Marquess was seised of certain freeholds and copyholds subject to the mortgage of 62,000*l.*, and after reciting deed A, the Marquess conveyed to Captain Hervey all his unsettled freeholds and copyholds subject to the mortgage of 62,000*l.*, and by which Captain Hervey covenanted to keep the Marquess indemnified against all the covenants contained in the indentures of mortgage.

3. A deed marked C, dated December 7, 1899, and made between the Marquess of the first part and Captain Hervey of the other part, which, after reciting that the Marquess was indebted to Captain Hervey in sums of money amounting in the aggregate to 123,800*l.*, witnessed that it was thereby agreed and declared between the Marquess and Captain Hervey, as and by way of family arrangement, that the unsettled estates, as from July 1, 1897, were to be deemed to have been the property of Captain Hervey, that the rents of the settled and unsettled estates should, immediately on collection, be paid henceforward into the estate account, that the rents and profits of the unsettled estates should be a primary fund for the payment of the interest for the time being due on the mortgages, that a certain sum should every half-year be transferred from the estate account to the Marquess's private account, that Captain Hervey should from time to time pay into the estate account such sum as might be necessary to keep that account in funds, and many other similar matters for carrying out the family

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arrangement. The deed contained this clause: "The Marquess and Captain Hervey shall have full power from time to time by any deed or deeds executed by both of them to alter, cancel, or make void this family arrangement in such manner and to such extent as they shall think fit."

The indenture then went on to witness that, in pursuance of the family arrangement and in consideration of the assignment by the Marquess thereinafter contained, Captain Hervey released the Marquess from all debts, and the Marquess assigned to Captain Hervey certain personal property, plate, jewels, &c., absolutely. The Marquess further covenanted that he would use his best endeavours to keep down expenses, and that he would not mortgage the settled estates without the consent of Captain Hervey.

The Commissioners were of opinion that deeds B and C respectively were conveyances on sale within the meaning of the Stamp Act, 1891, and that the consideration for the sale assessable to ad valorem duty consisted of the sums of 62,000*l.* and 123,800*l.* respectively, and assessed the stamp duty accordingly, but at the request of the Marquess stated this case for the opinion of the Court.

Danckwerts, *K.C.*, and *W. B. Coltman*, for the appellant. These deeds were not conveyances on sale, but part of a family arrangement. They must be regarded as a whole, and the effect of the arrangement must be taken into consideration as well as its purpose and motive. In order for a deed to be a conveyance on sale, there must be a transference of property for a price.

[They referred to *Foster* v. *Commissioners of Inland Revenue* (1); *Attorney-General* v. *Hawkins* (2); *Massy* v. *Nanney* (3); *Denn* v. *Diamond* (4); *Waring* v. *Ward* (5); *Wigmore* v. *Joyce* (6); *Lord Advocate* v. *Sidgwick* (7); *Attorney-General* v. *Lord Braybrooke*. (8)]

(1) [1894] 1 Q. B. 516.
(2) [1901] 1 Q. B. 285.
(3) (1837) 3 Bing. N. C. 478.
(4) (1825) 4 B. & C. 243; 28 R. R. 237.
(5) (1802) 7 Ves. 332; 5 R. R. 134.
(6) (1848) 13 Ir. L. R. 164.
(7) (1877) 4 R. 815.
(8) (1860) 5 H. & N. 488.

If, however, the deeds are regarded separately, deed B is merely supplementary to deed A, and does no more than put into the form of a deed the rights which Captain Hervey would have by law after taking over the mortgage debt of 62,000*l.* As to deed C, that cannot be a conveyance on sale, since it contains a clause authorizing the Marquess and Captain Hervey to cancel or alter the arrangement at any time.

The Attorney-General (*Sir R. B. Finlay, K.C.*), (*S. A. T. Rowlatt* with him), for the Crown. The deeds, although they may form part of a family arrangement, are primarily conveyances on sale. The clause enabling the Marquess and Captain Hervey to cancel only applies to the family arrangement, and does not invalidate the conveyance by the Marquess of his interests to Captain Hervey.

[He was stopped.]

KENNEDY J. In this case I think the Crown is clearly right in the claim to treat the deeds as conveyances on sale within the meaning of the Stamp Act, and that the stamp must be a stamp to be calculated as if the consideration for the sale were the sums of 62,000*l.* and 123,800*l.* The argument branches into two parts. First, it is said with regard to deed B, treating the deeds separately, there is really no sale at all. It is said that what is there dealt with is something which would be implied in law under all circumstances from the fact that there had been that which takes place in deed A. I cannot, I confess, agree with that. The three deeds, it seems to me, must be treated as part of one arrangement, and the fact remains that while Captain Frederick William Fane Hervey took over the equity of redemption, entering into covenants in place of the Marquess with the mortgagees, he did, in fact, get the conveyance or assurance to himself of the unsettled freeholds and copyholds, subject to the mortgage, in consideration of that sum of 62,000*l.*

Further, I am of opinion on the second branch of the case that it is impossible to treat the transaction here as being one (as it is called) of family arrangement so as to exclude a conveyance on sale. There may be things which are clearly not

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conveyances on sale and yet are family arrangements which involve certain considerations of money's worth being dealt with in the transaction, but as to which it could not correctly be said that there has been a conveyance on sale; but it seems to me equally clear that there may be things which are in a sense family arrangements, but which also involve and are, so far as the documents are concerned, conveyances on sale. If the method or machinery adopted is really a conveyance on sale—a sale for money—it matters not that the ultimate purpose of the parties in making use of this machinery may be of an indirect nature—not necessarily involving a money gain to the one side or to the other. There may not be a bargaining for the purpose of making profit, in the sense of money profit, but none the less it appears to me that, if there is a conveyance of property and money given for it, it matters not whether or not it is entered into by the one party or the other because it will facilitate the maintenance of good relations between the parties, or help, it may be, the buyer to preserve intact an estate in which he has, either from affection or from the prospect of inheritance, a special interest. Here there has been clearly a conveyance of the various interests (chattel and other) which Captain Hervey has bought, and which have been conveyed to him for the sums which are stated here. I thought it right myself, for my own satisfaction, to ask the Attorney-General to argue one point, namely, the question of the effect of this cancellation clause. Upon the whole, after what I have heard from him, I have come to the conclusion that the so-called cancellation clause does not mean that there is not to be a real conveyance on sale or one which is not intended to be binding, but that the family arrangement may be at any time varied, while there is an absolute sale of the chattels and the other interests under this deed for the sum which is expressed to be thereby released, namely, the 123,800*l*. I think, therefore, that the Crown is entitled to say that these documents must be treated as requiring an ad valorem stamp.

PHILLIMORE J. I am of the same opinion, and, agreeing as I do with the reasons given by my brother, I have very little

to add. It did seem to me when I listened carefully and read the explanation of these three deeds—particularly deed C—given by Mr. Danckwerts, reasonably clear—taking the whole as one transaction—that it was a transaction which, at any rate in part, was a transaction of sale and purchase, the purchaser being Captain Hervey and the seller being the Marquess of Bristol. The considerations moving from Captain Hervey, I think, are all money considerations. The indemnity against the 62,000*l.*, the release of the debt of 123,800*l.*, the arrangement by which something in the nature of a varying annuity may have to be paid to Lord Bristol during the joint lives of the two parties—those are, I think, all considerations moving from Captain Hervey, and they are all money considerations. Even if they are not all the considerations, they are, at any rate, the primary considerations, and numbers of cases have taught us that there may be subsidiary considerations moving from a purchaser to a vendor which, none the less, leave the transaction one of sale. What Lord Bristol gave is not quite so tangible or clear; but it does not matter whether he gave money or whether he gave land—he is the seller. The purchaser is Captain Hervey, who, as I say, either gave all in money, or gave as the primary consideration money. We are not, I understand, troubled with the question whether the duty should be assessed on deeds B or C, or how it shall be apportioned between B and C. All we say is that the Commissioners are entitled—however they choose to apportion it—to treat the whole transaction as one transaction, and to require an ad valorem stamp or stamps upon one or both of the two deeds sufficient to cover the 62,000*l.* and the 123,800*l.*

Judgment for the Crown.

Solicitors for appellants: *Coe & Co.*

Solicitor for the Crown: *The Solicitor of Inland Revenue.*

A. P. P. K.

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May 8.

HAMILTON RUSSELL *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp—Settlement—Power of Appointment—Exemption—Stamp Act, 1891 (54 & 55 *Vict. c.* 39). *Sched. I.*

By a voluntary settlement a father conveyed to trustees certain securities to be held on certain specified trusts for the benefit of his children. The settlement contained a provision that the trustees might at the request of any of the children revoke the trusts concerning that child's settled share, and resettle that share for the benefit of a certain specified class of persons. Subsequently, at the request of the appellant, who was one of the children, and in contemplation of his marriage, the trustees revoked the trusts of the original settlement concerning his share, and declared that, after certain trusts during his life, the share should be transferred at his death to the trustees of his marriage settlement upon the trusts declared concerning the same in that settlement. By the marriage settlement, which was of even date, the appellant's share was settled on trusts which were within the power of appointment given to the trustees by the original settlement:—

Held, that the marriage settlement was not, within the exemption to the Stamp Act, 1891, an instrument of appointment relating to property in favour of persons described as the objects of a power of appointment, and that it was, therefore, liable in respect of the appellant's trust fund to ad valorem stamp duty.

CASE stated by the Commissioners of Inland Revenue under s. 13 of the Stamp Act, 1891.

On May 3, 1899, two unstamped instruments were presented on behalf of the appellant, the Hon. C. E. Hamilton Russell, to the Commissioners of Inland Revenue as to the stamp duty with which each of the instruments was chargeable.

The instruments were described as a deed of revocation and a marriage settlement. Each of the instruments was dated April 10, 1899, and the question arose as to the stamp duty assessed on the marriage settlement.

By a settlement made on June 28, 1895, between Viscount Boyne of the one part and certain trustees therein named of the other part, after reciting that Lord Boyne was desirous of making an immediate provision for his five children, of whom the appellant C. E. Hamilton Russell was one, and that for that purpose he had transferred into the joint names of the

trustees certain investments, it was agreed and declared that the trustees should stand possessed of those investments as from July 1, 1895, upon trust for the five children in equal shares, but so, nevertheless, that the settled share of each child should be held by the trustees upon the trusts and subject to certain powers, provisions, and limitations therein set out. The settlement contained the following proviso: "Provided always that it shall be lawful for the trustees . . . . in their . . . . absolute discretion, at the request of any of the said five children, either in contemplation of marriage or subsequently to marriage, to revoke the trusts hereinbefore declared concerning such child's settled share, and by way of resettlement to declare such new or other trusts of and concerning the same as the trustees . . . . may think fit for the benefit of all or any to the exclusion of the others or other of the following persons, namely, such child, or any wife or husband of such child or such child's children or remoter issue, or the next of kin of such child, but not in favour of any other person or persons, and on any such resettlement such child's settled share may be transferred to trustees appointed by any such resettlement."

This settlement was stamped with ad valorem duty at the rate of 5*s.* for every 100*l.* of the amount or value of the property settled, and no question arose as to the duty paid thereon.

By a deed of revocation dated April 10, 1899, and made between the trustees of the settlement of 1895 of the first part, the appellant C. E. Hamilton Russell of the second part, and certain persons therein called the marriage settlement trustees of the third part, after reciting that a marriage was intended to be solemnized between the appellant and Maria Lindsay Wood, and that it had been agreed that the one-fifth share of the appellant of and in the trust funds comprised in the settlement of 1895 should be resettled under the power given to the trustees in that behalf by that settlement, it was witnessed that, at the request of the appellant, the trustees of the settlement of 1895 thereby revoked the trusts of that settlement concerning the one-fifth share of the appellant, and by way of resettlement declared that the said one-fifth share should from and

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after the solemnization of the marriage be held upon trust to pay the income to the appellant for life, and after his decease to pay or transfer, at such time and in such manner as was thereinafter agreed and declared, the capital of the said one-fifth share to the trustees of a deed of even date, being the settlement to be made in contemplation of the intended marriage, to be held by those trustees upon the trusts and subject to the powers and provisions declared and contained concerning the same in the said marriage settlement.

This deed of revocation was stamped with the duty of 10*s*. according to the assessment of the Commissioners, and no question now arose as to the duty paid thereon.

By another deed, also dated April 10, 1899 (being the marriage settlement in respect of which this case was stated), made between the appellant of the first part, the said M. L. Wood of the second part, Sir Lindsay Wood of the third part, and the marriage settlement trustees of the fourth part, after reciting the intended marriage, the settlement of 1895, and the deed of revocation, it was witnessed (inter alia) that after the death of the appellant the marriage settlement trustees should stand possessed of the one-fifth share of the funds comprised in and settled by the settlement of 1895, upon trust to pay the annual income thereof to the intended wife, M. L. Wood, during her life and during every coverture for her separate use and without power of anticipation, and after her death in trust for all or such one or more exclusively of the others or other of the children or remoter issue of the intended marriage at such time and in such shares and generally in such manner as the intended husband and the intended wife should jointly appoint; and in default of and subject to any such appointment, then as the survivor should appoint; and in default of and subject to any such appointment, in trust for the child, if only one, or all the children equally, if more than one, of the intended marriage who being male should attain the age of twenty-one years, or being female should attain that age or marry under it. The marriage settlement also contained a declaration that if there should be no child of the intended marriage who being male should attain the age of twenty-one years, or being

female should attain that age or marry, then, subject to the trusts and powers therein declared and contained or by law vested in them, the marriage settlement trustees should stand possessed of the husband's trust fund upon such trusts as the appellant should by will appoint.

The marriage settlement further contained a conveyance to the marriage settlement trustees of the wife's trust fund and provisions for its settlement.

The Commissioners were of opinion that ad valorem duty was payable upon the marriage settlement under the head "Settlement" in Sched. I. of the Stamp Act, 1891, upon the amount or value of all the property thereby settled; but the appellant contended that the duty was not payable in respect of the husband's trust fund, and relied on the terms of the exemption under the same head. He submitted, therefore, that as regards the husband's trust fund the marriage settlement was chargeable with the fixed duty of 10*s.* only. The Commissioners, however, assessed the marriage settlement as chargeable with ad valorem settlement duty, but stated this case for the opinion of the Court.

By the 1st schedule to the Stamp Act, 1891 (54 & 55 Vict. c. 39), "Settlement. Any instrument, whether voluntary or upon any good or valuable consideration other than a bonâ fide pecuniary consideration, whereby any definite and certain principal sum of money . . . . and any definite and certain amount of stock or any security, is settled or agreed to be settled in any manner whatsoever: For every 100*l.*, and also for any fractional part of 100*l.*, of the amount or value of the property settled or agreed to be settled . . . . 5*s.*

"Exemption. Instrument of appointment relating to any property in favour of persons specially named or described as the objects of a power of appointment where duty has been duly paid in respect of the same property upon the settlement creating the power, or the grant of representation of any will or testamentary instrument creating the power."

Ingpen, K.C. (*Dunham* with him), for the appellant. The marriage settlement as regards the husband's trust fund is

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within the exemption, and is not liable to pay ad valorem stamp duty. It is merely supplementary to the deed of revocation of even date, which is the real instrument of appointment and which must be read with it. It appoints to persons specially named as the objects of the power by the original settlement of 1895, and it comes, therefore, within the precise words of the exemption. An appointment is none the less within the exemption because it purports to settle the property appointed or to alter the trusts of the original settlement. The marriage settlement as regards the husband's trust fund must be treated as an annex or schedule to the deed of revocation of even date, on which admittedly no ad valorem duty is payable because it is within the exemption.

The Attorney-General (*Sir R. B. Finlay, K.C.*), (*S. A. T. Rowlatt* with him), for the Crown. The document in question is not within the exemption. It is not merely an instrument of appointment under the settlement of 1895, but is a settlement of the husband's and wife's trust funds. Both, therefore, are liable to ad valorem duty. The deed of revocation of even date purported to be made in exercise of the power of appointment given by the settlement of 1895, and it was therefore adjudged to be within the exemption, and no ad valorem duty was imposed; but it is impossible to treat this marriage settlement as merely an annex or schedule to that deed. It purports to be, and is, an ordinary marriage settlement, and as such is liable to ad valorem stamp duty.

Ingpen, K.C., replied.

KENNEDY J. We have heard an ingenious argument on the part of those who are seeking for the exemption of the claim made as regards the stamping of this document, which is declared on the face of it to be and is described as a settlement. It is said that it comes within the exemption in the schedule to the Stamp Act under the head of "Settlement." It is said that, although the document is a marriage settlement and contains a disposition, by way of settlement, of the trust fund of the intended husband, yet it deals with that fund only in reference to a deed of even date, to which the trustees of the

settlement of 1895, who could appoint the intended husband's fifth share in the way in which they did, were parties. Those trustees, who possessed that power of appointment under the provisions created by the deed of 1895, are not parties to the marriage settlement. It is said that this marriage settlement ought to be treated in reference to the husband's trust fund as coming under the exemption, because what is done in that deed is said to be merely an explanation or exposition of that which in point of law was effectually done by a valid appointment in the deed of revocation of even date, and that this marriage settlement ought to be treated in respect of the husband's trust fund simply as an annex or schedule to the deed of even date. It is contended, therefore, that there is nothing really done by this marriage settlement in respect of the husband's trust fund, the effectual appointment being made by the deed of the same date called the deed of revocation, on which there is no claim to impose an ad valorem stamp. I cannot agree with that contention. The document is on the face of it described as a marriage settlement, and a marriage settlement it is; and it does more in regard to the husband's trust fund than merely serve as what one may call a descriptive or explanatory schedule to another deed. It is a marriage settlement by which the various parties to that deed, including the husband and the wife and the trustees of the marriage settlement, do in fact validly agree to the disposition of the funds. If this had been merely a deed between the same parties, as the parties to the deed of revocation—not supplementary in the sense of effectually supplementing, but merely setting out in fuller detail the powers and provisions declared in the deed of revocation of the same date, I think there would be a great deal to say for the contention; but it is not so. It is an effectual document as a settlement—it is a necessary complement for the purpose, not merely of setting out this additional or descriptive provision as to the manner in which the power of appointment is to be exercised, but for the purpose of effectuating an agreement between the parties by way of settlement, affirming and giving a real legal effect to that which no doubt the deed of revocation enabled to be done. I hold that this is not within the

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exemption a mere instrument appointing the "property in favour of persons specially named or described as the objects of a power of appointment," but that it is a settlement not within that exemption, and upon which, therefore, in respect of the husband's trust fund, the stamp must be the ad valorem stamp.

PHILLIMORE J. I agree. The question here is the liability to ad valorem duty of an instrument under seal which on the face of it purports to be a settlement, and therefore primâ facie would be liable to settlement duty. Three grounds have been given why it should be exempt. The first was that taken before the Commissioners—that it was exempt as being within the exemption clause in the schedule to the Stamp Act as an instrument of appointment made under the powers given by the settlement of 1895. I agree that an instrument of appointment is none the less within that exemption because it purports (using ordinary language) to resettle the property appointed. I agree that, primarily speaking, every instrument of appointment under a particular power varies the trusts of the settlement, and must therefore be regarded as a resettlement, and is exempt by the express words of the exemption in the schedule to the Stamp Act, and that it is none the less exempt because it does not simply appoint to one object of the power of appointment, but appoints to various objects subject to various limitations and powers. That is a very good reason why the instrument which has been called the deed of revocation of even date has not been held liable, and is not now sought to be made liable, to settlement duty; but the instrument with which we have to deal is the marriage settlement. I entirely adopt the words of my learned brother. This is not a mere annex or schedule to the deed of revocation; it carries the matter further: it is a complement to that deed, and as such complement it acts by virtue of being a settlement, and therefore I think it is liable to the duty. It is worthy, I think, of notice that there are additional parties to the instrument under consideration; but even if that were not so it would still be not a mere annex to the deed of revocation, but a com-

pletion and further execution of a scheme of arrangement, and as such it is an execution by way of settlement, and is, therefore, liable to duty. I agree that our judgment must be for the Crown.

Appeal dismissed.

Solicitors for appellant: *Tarry, Sherlock & King.*
Solicitor for the Crown: *The Solicitor of Inland Revenue.*

A. P. P. K.

SOUTHWELL *v.* SAVILL BROTHERS, LIMITED.

1901
May 15.

Revenue—Income Tax—Deductions—Balance of Profit—Brewery Business—Expenses of Applications for New Licences—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D.*

The respondents, a brewing company, with the view of increasing their trade, were in the habit of making applications to the licensing justices for new licences to houses owned by them or in which they were interested. It was the practice of the licensing justices to require the applicant for a new licence to offer to surrender an existing licence as a preliminary to the grant of a new one; and in order to meet this requirement the respondents were in the habit of paying certain annual sums to the holders of certain existing licences for the right to call for a surrender of those licences if the justices required it. The sums so paid, together with the other expenses incidental to their applications for new licences (such as law costs and the cost of printing and advertising), the respondents claimed, in those cases in which their applications for new licences were unsuccessful, to deduct as a necessary annual trade expense in the computation of their profits and gains in their trade as brewers for the purposes of income tax:—

Held, that the sums so expended were employed as capital in the trade, and that the deduction consequently could not be allowed.

CASE stated by Commissioners of Income Tax for the Division of Beacontree, in the county of Essex, upon an appeal by Savill Brothers, Limited, against an assessment of 35,000*l.* in respect of their profits as brewers, duly made and charged upon them for the year ending April 5, 1900.

The respondents, Savill Brothers, Limited, carry on the trade of brewers at Stratford, in the county of Essex, and they submitted accounts shewing profits for the year 1897, 31,247*l.* 6*s.*; for 1898, 33,555*l.* 10*s.* 4*d.*; and for 1899, 30,752*l.* 13*s.* 5*d.*; but

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in arriving at these figures they had deducted for the year 1897, 780*l.* 16*s.* 2*d.*; for the year 1898, 1576*l.* 4*s.* 10*d.*; and for the year 1899, 2242*l.* 15*s.* 2*d.*; these sums being expended in connection with applications made by the respondents to the licensing justices for the grant of new and additional licences to houses owned and leased by them, and also to houses not owned by them, but for which the respondents conduct the applications for the purpose of maintaining and if possible increasing their trade. These expenses consist of law costs, printing and advertising, preparing petitions, serving notices, court fees, surveyor's fees, and payments for the "call of licences." The sums expended on this latter account during the three years were respectively 250*l.* in 1897, 1015*l.* 15*s.* in 1898, and 1525*l.* in 1899. These amounts represent payments made to the owners of public-houses for the right to call for a surrender of the licences attached to the houses, in the event of the licences being required by the licensing justices to be surrendered before the grant of a new licence for a new house.

The respondents contended that as the licensing justices for the Beacontree Division (which comprises the district where the bulk of their trade is carried on) require an applicant for a new licence to offer surrenders of existing licences as a preliminary to the grant of a new licence, the amounts paid for the call of these surrenders and the other expenses aforesaid are a necessary trade expense incurred in the ordinary course of the business of a brewer. When the applications are unsuccessful, these expenses are charged to the "licences expenses" of the year. When the application is successful, the expenses are added to the cost of the new house.

On behalf of the Crown it was contended that the expenses referred to were not wholly and exclusively laid out for the purposes of trade as brewers, but were altogether outside it, being an outlay of capital made with a view to the extension of their business by increasing the number of houses which would be supplied with their goods, and that therefore such expenses were not allowable as deductions under the rules of Sched. D.

The Commissioners determined that, having regard to the

requirements of the licensing justices, the amounts should be allowed as a necessary annual trade expense incurred by the respondents as brewers, and reduced the assessment to 31,852*l.*, being the average profits of 1897, 1898, and 1899. The surveyor of taxes appealed.

The question for the opinion of the Court is whether the amounts charged as expenses in connection with the applications for new licences—namely, 780*l.* 16*s.* 2*d.*, 1576*l.* 4*s.* 10*d.*, and 2242*l.* 15*s.* 2*d.*—are legal deductions under the provisions of 5 & 6 Vict. c. 35, s. 100.

Sir E. Carson, S.-G., and *Rowlatt*, for the Crown. The deduction claimed ought not to be allowed. In the first place, the expenses in question are not trade expenses of a brewer at all. In *Watney* v. *Musgrave* (1) Kelly C.B. said that in a brewery business the allowable deductions "are confined entirely and exclusively to the costs and expenses incurred in the production of the article." Here the expenses are connected, not with the production of the beer, but with its distribution, and consequently they are not "money wholly and exclusively laid out or expended for the purposes of such trade" of brewing, within the meaning of case 2, rule 1, of Sched. D. Secondly, it is in any event a capital expenditure, and no deduction is allowed "for any sum employed or intended to be employed as capital in such trade": case 1, rule 3.

Sir E. Clarke, K.C., and *Avory, K.C.*, for the respondents. These expenses were part of the necessary expense of the trade of a brewer as that trade is conducted at the present day. The language of Kelly C.B. in *Watney* v. *Musgrave* (1) was unnecessary to the decision, and went much too far. It is not correct to say that the deductable expenses are limited to the cost of production. In *Reid's Brewery Co.* v. *Male* (2) it was held that brewers, who carried on as an adjunct of their brewery business the business of money-lenders, in the course of which they lent money to their customers, in substance carried on but one trade, and that bad debts in respect of loans to customers might be deducted in computing the profits of the brewery. Then if these expenses are expenses of the brewery trade the

(1) (1880) 5 Ex. D. 241, at p. 243. (2) [1891] 2 Q. B. 1.

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are deductable, for they are not a capital expenditure. The claim of deduction is limited to cases in which the application for a new licence is unsuccessful. When the application is successful, the brewers acquire an addition to their property, and then the case falls within case 1, rule 3, and the cost of getting the licence cannot be deducted from the profits. But where the application is unsuccessful, the expense is deductable in the same way that the expenses of advertising with a view of extending the business would be deductable. It is true that there is a dictum of Kelly C.B., in *Watney* v. *Musgrave* (1), to the effect that the costs of advertisements would not be deductable. But that dictum is not law. If the respondents were to issue a prospectus without disclosing these expenses of unsuccessful applications for licences in their statement of their profits, the prospectus would be fraudulent. If the loans to customers in *Reid's Brewery Co.* v. *Male* (2) were not an investment on the capital account, neither are the expenses in question here.

Sir E. Carson, S.-G., for the Crown. No distinction can be drawn between unsuccessful and successful applications. If the expenses of the one are a capital expenditure, the expenses of the other must equally be so.

KENNEDY J. In my opinion the appeal of the Crown in this case must succeed. The Commissioners held that these expenses in connection with the unsuccessful applications for new licences were deductable as a necessary annual trade expense. I have come to the conclusion that that view is wrong. It seems to me that they are not an expenditure which ought to be treated as a loss—as something to be put against that which they have gained in the year as profits and to be deducted therefrom for the purpose of getting at the sum on which they are assessable to income tax; but that they are sums which ought properly to be regarded as an investment, and which consequently ought to be carried to the capital account. If, as has been admitted by the respondents, they are not justified in deducting from their profits the expenses of applications for new licences where the applications are

(1) 5 Ex. D. 241, at p. 243. (2) [1891] 2 Q. B. 1.

successful, it is difficult to see now how they can claim to deduct the expenses where the applications are unsuccessful. In my opinion no distinction can be drawn between the two classes of expenses. The fact that the expenditure does not turn out to be a profitable investment cannot alter the nature of the expenditure, or make it any the less an investment of capital.

PHILLIMORE J. I am of the same opinion. It appears that the expenses in question are all incurred in connection with unsuccessful applications, and it is conceded by Sir Edward Clarke that he cannot claim to deduct similar expenses in connection with successful applications. But if they are not to be deducted in so far as they are in respect of successful applications, why are they to be deducted where they are in respect of unsuccessful applications? They are not to be deducted if the applications are successful because they are not part of the annual expenditure of the brewer in the course of the year; they are sums which, either out of capital or out of savings of realized profits, he applies in extending his business. Why is it not the same thing if he applies those sums in attempts to extend his business and fails? The money which is spent in buying the right to call for licences is spent before the licensing day comes round. To what account is that expenditure to be carried in the interval between the date when it was incurred and that of the licensing session? If the application succeeds, it is to be carried to the capital account. It seems to me that it must stand in the same position in the interval as it will at the end; and if it may not at the end stand as an ordinary deduction from the annual profits as an annual trade expense, neither can it so stand in the interval at the time when it is not known whether the application will be successful or not.

Appeal allowed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Sandilands & Co.*

J. F. C.

C. A.
1901
May 21.

[IN THE COURT OF APPEAL.]

In re A DEBTOR.

Bankruptcy—Practice — Receiving Order — Stay of Proceedings — Appeal— "Creditors"—Service of Notice of Appeal—"Parties directly affected by the Appeal"—Rules of Supreme Court, 1883, *Order* LVIII., *r.* 2—*Bankruptcy Rules*, 1886, *r.* 134.

A receiving order having been made against a debtor upon a creditor's petition, the registrar, upon the application of the debtor supported by the majority of persons claiming to be creditors, including the petitioning creditor, stayed the issue of advertisements and all other proceedings under the receiving order for a limited period. The official receiver appealed against the stay, the debtor alone being served with notice of the appeal :—

Held, that notice of the appeal must be served also on the petitioning creditor as being a party "directly affected by the appeal" within Rules of the Supreme Court, 1883, Order LVIII., r. 2 (made applicable to bankruptcy appeals by rule 134 of the Bankruptcy Rules, 1886), but not on any other of the alleged creditors.

In this case a receiving order had been made against the debtor; but upon his application, and with the consent of the official receiver and also of the petitioning creditor and other alleged creditors to a large amount, who were of opinion that there was some probability of their ultimately being paid in full, the registrar, on December 21, 1899, made an order staying the usual advertisements and other proceedings under the receiving order for a certain time, the debtor undertaking not in any way to deal with any of his assets, and to give such information as the official receiver might require. Subsequently, the stay was extended for a limited period; and eventually, on April 24 last, upon the application of the debtor, the registrar made an order granting a further stay until after June 26 next. That application was supported by alleged creditors to a very large amount, both secured and unsecured, including the petitioning creditor, but was opposed by the official receiver and by one alleged creditor whose debt was comparatively small. The official receiver now appealed from that order. The notice of appeal having been served upon the debtor alone, a preliminary

objection was raised on his behalf, upon the appeal being opened, that all the alleged creditors who appeared on the application before the registrar, and especially the petitioning creditor, should also have been served with notice of the appeal, as being "parties directly affected by the appeal," within Rules of the Supreme Court, 1883, Order LVIII., r. 2 (1), and that the appeal could not be heard in their absence.

Asquith, K.C., Herbert Reed, K.C., and *F. Cooper Willis*, for the debtor, in support of the objection. The creditors who appeared on the application, and especially the petitioning creditor, are clearly "parties directly affected by the appeal," and therefore should have been served with notice of the appeal, as required by the rule, which is made applicable to bankruptcy appeals by rule 134 of the Bankruptcy Rules, 1886.

The Solicitor-General (*Sir E. Carson, K.C.*), and *Muir Mackenzie*, for the appellant, the official receiver. This is the first time it has been ever suggested that notice of an appeal in bankruptcy should be served upon every person claiming to be a creditor. Non constat that the persons claiming to be creditors are in fact creditors at all; for there has been no examination of the debtor as to who are his creditors, no statement of affairs, and no proof of debts. In short, the proceedings have not advanced beyond the receiving order, and there is nothing yet to shew who are entitled to appear in the proceedings. A creditor cannot appear at all unless he has proved his debt, for until he has proved he is not a creditor: *Ex parte Rylands* (2); so that at present there is nothing to shew who are the persons entitled to be served. In *In re Lord*

(1) Rule 2 of the order is as follows: "The notice of appeal shall be served upon all parties directly affected by the appeal, and it shall not be necessary to serve parties not so affected; but the Court of Appeal may direct notice of the appeal to be served on all or any parties to the action or other proceeding, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may be just, and may give such judgment and make such order as might have been given or made if the persons served with such notice had been originally parties. Any notice of appeal may be amended at any time as the Court of Appeal may think fit."

(2) (1877) 6 Ch. D. 57, 62.

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Thurlow (1), where it was held that the Court might, under s. 105, sub-s. 2, of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), adjourn an application for adjudication where it saw good reason for doing so, apparently no creditors were served, for none were represented by counsel, and it was not suggested that creditors should be represented on the appeal. As it is impossible at the present stage to serve "creditors" the official receiver is entitled to prosecute his appeal against the registrar's order, as being a "person aggrieved" by the order within s. 104, sub-s. 2, of the Bankruptcy Act, 1883: *In re Reed, Bowen & Co.* (2) The Court has a discretion as to its mode of dealing with a receiving order, and is not bound to adopt a particular course merely because all the creditors may be in favour of it: *In re Hester.* (3)

Asquith, K.C., in reply. Although under s. 104, sub-s. 2, of the Bankruptcy Act, 1883, "any person aggrieved" may appeal from an order, sub-clause (*d*) of that sub-section says that "no appeal shall be entertained except in conformity with such general rules as may for the time being be in force in relation to the appeal"; and as Order LVIII., r. 2, applies to bankruptcy appeals, it is submitted that, at all events, the petitioning creditor should be served, for he is unquestionably a "party directly affected by the appeal."

COLLINS L.J. I am of opinion that, with regard to the creditors other than the petitioning creditor, they cannot be said to be "directly affected by the appeal." But with regard to the petitioning creditor, I think he is "directly affected by the appeal," and the only thing that would justify his not being served would be his having assented to the order appealed from in such a way that he must be taken to have renounced his right to be served with the notice of appeal. But no such assent has been given, and it is possible that he may be desirous of opposing the appeal. I, therefore, think he ought to have the opportunity of doing so, if he desires it; accordingly, the preliminary objection must be allowed as regards the petitioning

(1) [1895] 1 Q. B. 724. (2) (1887) 19 Q. B. D. 174.
(3) (1889) 22 Q. B. D. 632.

creditor, and the appeal must stand over until the appellant has served him with notice.

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STIRLING L.J. I agree.

Objection allowed.

Solicitors: *Durant; Solicitor to the Board of Trade.*

G. I. F. C.

[IN THE COURT OF APPEAL.]

C. A. 1901 *June* 5.

THE KING *v.* JUSTICES OF SUNDERLAND.

Licensing Acts—Certiorari—Confirming Authority, Order of—Justices—Disqualification—Bias, Likelihood of—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *ss.* 38, 43.

A writ of certiorari will lie to bring up an order of justices acting as the confirming authority under the Licensing Act, 1872.

Reg. v. *Manchester Justices*, [1899] 1 Q. B. 571, approved of.

A municipal corporation having, for the purposes of a street improvement, purchased certain premises licensed for the sale of intoxicating liquors, an agreement was entered into between the corporation and a brewery company, by which the company agreed to pay to the corporation a sum of money, in the event of a licence being granted to the company for the sale of intoxicating liquors on certain premises belonging to them, and the corporation agreed to close the before-mentioned licensed premises, and not to make, or allow to be made, any application for a renewal of the licence in respect of them.

Certain justices for the borough, who were also members of the borough council, had taken an active part in the council in support of the proposal that the above-mentioned agreement should be entered into by the corporation. These justices subsequently sat on the hearing of an application to the licensing committee on behalf of the brewery company for a licence in respect of their before-mentioned premises, which was granted. On the application to the confirming authority under the Licensing Act, 1872, for confirmation of the grant of the licence to the company, the same justices again sat to hear the application, which was granted. On an application for a certiorari to bring up and quash the order confirming the grant of the licence:—

Held, that, there being a real likelihood of bias on the part of the before-mentioned justices with regard to the subject-matter of the application to the confirming authority, the writ of certiorari must be issued.

APPEAL from the order of a Divisional Court (Lord Alverstone C.J. and Lawrance J.) discharging a rule nisi for a

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certiorari to bring up and quash an order made at a meeting of licensing justices, acting in and for the county borough of Sunderland as the confirming authority for that borough, whereby a provisional grant of a licence to one John Duncan for the sale of intoxicating liquors on certain premises to be erected in Pallion Road in the said borough was confirmed.

In the year 1899 the Corporation of Sunderland purchased certain licensed premises in High Street, Sunderland, known as the Londonderry Hotel, for the sum of 14,600*l.*, for the purpose of improving the street by throwing a portion of the site of the hotel into the thoroughfare. Attempts were made by the corporation to make arrangements for the rebuilding of the hotel on the portion of the site which was not required for the purpose of widening the street, but these attempts did not prove successful. On August 8, 1900, a resolution was passed by the borough council that they should consent to the transfer or lapsing of the licence for the Londonderry Hotel, and to the hotel being demolished, and that the highways committee of the council should be instructed to negotiate accordingly, and report the terms they recommended for acceptance. Negotiations on the subject were thereupon entered into by the highways committee, and tenders invited from various firms of brewers, which ultimately resulted in an agreement under seal being entered into, bearing date August 22, 1900, between the Corporation of Sunderland of the one part and Duncan & Dalgleish, Limited, a brewery company, of the other part. By that agreement it was recited that the company by John Duncan intended to apply at the adjourned general annual licensing meeting to be held on September 20 then next at Sunderland for a licence authorizing him to sell by retail all intoxicating liquors to be consumed on or off the premises to be erected in Pallion Road, Sunderland, and to be known as the Pallion Hotel, that, upon such application, the company were desirous of offering to surrender an existing licence of the same nature as the licence for which application was intended to be made as aforesaid, provided such application was granted, and that the

corporation were the owners of the premises then licensed for the sale of all intoxicating liquors either on or off the premises situate in High Street, Sunderland, and known as the Londonderry Hotel; and it was thereby agreed (1.) that, in the event of the application of the brewery company for a licence being granted by the licensing committee and confirmed by the justices acting in and for the borough, the company would forthwith pay to the corporation the sum of 10,000*l.*; (2.) that the corporation, after payment of the said sum of 10,000*l.*, and upon the said premises in Pallion Road being opened for the sale of liquors under the said licence in that behalf, would close the said premises known as the Londonderry Hotel for the sale of intoxicating liquors, and would not apply or suffer application to be made to the said licensing justices or otherwise for the renewal thereafter of the certificate for the said premises, but would forthwith surrender the same; (3.) that, should the grant and confirmation of the licence in respect of the premises in Pallion Road be revoked by proceedings in the High Court of Justice expressly instituted for that purpose, the corporation would forthwith repay to the company the said sum of 10,000*l.*, and thereupon both parties to the agreement should be released from the terms thereof, and it should be null and void.

The chairman of the highways committee conducted the negotiations which resulted in the before-mentioned agreement. At the meeting of the borough council at which the resolution that the corporation should enter into the agreement was passed, the question whether they should do so was somewhat vigorously discussed, there being considerable opposition thereto by some members of the council, and the chairman of the highways committee made a speech in favour of the agreement, in the course of which he said in effect that, as trustees for the ratepayers, the council ought not to throw away the chance of getting the 10,000*l.* from Duncan & Dalgleish, Limited.

On August 23, 1900, the general annual licensing meeting for the borough of Sunderland was held, at which meeting seven justices, who were members of the licensing committee,

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were present, among whom were the chairman of the highways committee, the member of the council who had moved the resolution that the agreement should be entered into, and three others, who were members of the borough council. At that meeting the solicitor for the opponents of the applications for licences objected to the justices who were members of the council sitting and adjudicating upon any application for a licence in the district of Pallion, on the ground that they were members of the corporation, which was pecuniarily interested in the granting or refusing of licences in that district. No notice was taken of this objection, and at that meeting three applications for licences in the Pallion district made by parties other than Duncan & Dalgleish, Limited, were refused. On September 20 the adjourned general annual licensing meeting for the borough was held, at which John Duncan, on behalf of Duncan & Dalgleish, Limited, in pursuance of notice given by him, made application for a provisional grant of a licence for an hotel to be erected in Pallion Road. At that meeting six members of the licensing committee were present, among whom were the before-mentioned five justices who were members of the borough council.

Counsel on behalf of objectors to the granting of the licence protested against those justices sitting and adjudicating. The application for the licence was ultimately granted by a majority of the licensing committee. Upon September 27, 1900, the confirming authority for the borough sat to hear applications for the confirmation of licences. There were then present thirteen justices, among whom were the before-mentioned five justices. A solicitor appeared for the objectors to the granting of the licence to Duncan and objected to its confirmation, but by a majority of the justices present it was confirmed. A rule nisi was then obtained for a certiorari to bring up and quash the order confirming the licence on the ground that justices who were members of the borough council were under the circumstances disqualified from sitting to hear the application for a licence on behalf of Duncan & Dalgleish, Limited, by reason of the existence of a bias on their part. The Divisional Court were of opinion that the case came within the authority of

Reg. v. *Stockport Justices* (1), and discharged the rule. The applicants for the certiorari appealed.

C. A. Russell, K.C., and *Blaiklock*, for the appellants. According to the authorities the question in such cases as this is not whether the justices, against whom bias is alleged, were actually biassed with regard to the subject-matter to be adjudicated upon, in the sense that they did not in fact act impartially, but whether there was a real likelihood that they would be so biassed: *Reg.* v. *Meyer.* (2) This is not a case of a pecuniary interest, which, however small, raises a conclusive presumption of bias. The test, in the absence of such an interest, is whether the circumstances were such that, to the mind of a person not interested, judging fairly and reasonably, there would appear to be a probability of bias on the part of the justices. *Reg.* v. *Rand* (3) is distinguishable, because in that case the only interest alleged to exist in the justices was that of trustees for public bodies, and there was nothing to shew that they had taken any active part in relation to the subject-matter for adjudication so as to indicate the probability of a bias on their part. It is contended that, having regard to the fact that certain of the justices who sat to hear the application for a licence by Duncan & Dalgleish, Limited, had been active in promoting the agreement between them and the corporation, and that the payment of 10,000*l.* to the corporation under it depended upon the granting of the licence, there was a reasonable likelihood that those justices would approach the question whether the licence should be granted with a bias. It is submitted that *Reg.* v. *Stockport Justices* (1) was wrongly decided.

[They also cited on this point *Reg.* v. *Cumberland Justices* (4); *Reg.* v. *Hain.* (5)]

It has been held that a writ of certiorari will lie to bring up the order of justices sitting as a confirming authority under the Licensing Act, 1872, though it will not lie to bring up the

(1) (1896) 60 J. P. 552.
(2) (1875) 1 Q. B. D. 173.
(3) (1866) L. R. 1 Q. B. 230.
(4) (1888) 4 Times L. R. 294.
(5) (1896) 12 Times L. R. 323.

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provisional grant of a licence by the licensing committee: see *Reg.* v. *Manchester Justices* (1) and *Reg.* v. *Sharman.* (2)

E. Shortt, for the justices. The cases of *Reg.* v. *Rand* (3) and *Reg.* v. *Meyer* (4) shew that, in the absence of any pecuniary interest, there must be some substantial interest which creates a real bias. There is nothing here to shew that the justices who were members of the council had any such interest in or desire for the carrying out of the agreement between the corporation and Duncan & Dalgleish, Limited, as really incapacitated them from adjudicating impartially in the matter. If the mere fact that the agreement would benefit the ratepayers is considered sufficient to establish the existence of a bias in any justice who was also a member of the borough council, it would follow that such a borough justice would always be disqualified wherever the subject-matter of any inquiry before him might by any possibility affect the ratepayers, which would be a wholly untenable proposition. It is submitted that the decision in *Reg.* v. *Stockport Justices* (5) was correct and is exactly in point.

It was held in *Reg.* v. *Sharman* (2) that the effect of the judgment in *Boulter* v. *Kent Justices* (6) is to shew that a certiorari will not lie to bring up the order of a licensing meeting granting a licence, because it was there held that the licensing meeting is not a Court. No valid distinction can be drawn in this respect between the grant of a licence by the licensing committee and the confirmation of it by the confirming authority. It is submitted that s. 43 of the Licensing Act, 1872, cannot have the effect attributed to it by Channell J. in *Reg.* v. *Manchester Justices.* (1) The mere provision that the confirming authority may give costs to the successful party cannot have the effect of converting that authority, which in other respects stands on precisely the same footing as the licensing committee, into a Court in the proper sense of the term.

E. Tindal Atkinson, K.C., and *E. H. Lloyd*, for Duncan & Dalgleish, Limited. In order that a certiorari may lie, there

(1) [1899] 1 Q. B. 571.
(2) [1898] 1 Q. B. 578.
(3) L. R. 1 Q. B. 230.
(4) 1 Q. B. D. 173.
(5) 60 J. P. 552.
(6) [1897] A. C. 556.

must be an order against a party to some litigation. It was held in *Boulter* v. *Kent Justices* (1) that on the application to the licensing meeting there is no litigation between parties, and that that meeting is not a Court. The grant of a licence by a licensing meeting is not therefore an order in the sense before mentioned. There is no more a litigation between parties before the confirming authority than before the licensing meeting, and the confirmation of the grant of the licence by the confirming authority is no more an order than the original grant. The power of making an order for costs, given to the confirming authority by s. 43 of the Licensing Act, 1872, cannot make the confirmation of the grant of the licence, which in the absence of that power clearly would not be an order, into an order in the sense necessary that a certiorari may lie.

It has been suggested, not that justices are disqualified in respect of any matter which interests the borough, merely because they are members of the council or ratepayers, but that these justices were disqualified, because they had taken an active part in bringing about the agreement between the corporation and Duncan & Dalgleish, Limited. It is submitted that this suggestion goes a great deal too far. It is not enough to create a disqualification that a justice, under the circumstances, may be likely to have a strong opinion beforehand on the merits with regard to the subject-matter of adjudication. In order to create such a bias as will disqualify a justice, there must be some indirect interest or motive dehors the merits of the case.

C. A. Russell, K.C., for the appellants, was not called on to reply. (2)

A. L. SMITH M.R. This is an appeal against the refusal of a Divisional Court to make absolute a rule nisi for a certiorari to bring up and quash an order of justices for the county

(1) [1897] A. C. 556.

(2) A point was raised in argument on behalf of the appellants as to whether the principle of the decision in *Reg.* v. *Bowman*, [1898] 1 Q. B. 663, did not apply to the case before the Court; but, as the judgments did not turn on this point, the arguments with regard to it are not reported.

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borough of Sunderland, confirming a grant by the licensing committee of a licence for the sale of intoxicating liquors on premises in Pallion Road, Sunderland, on the ground that certain of the justices who made the confirming order were biassed in such a way as to disqualify them from sitting to hear the application for that order. So far as this question of bias is concerned, I do not see that any distinction can be drawn between the order of the licensing committee and the confirming order. By the first of these orders it is stated that, at a meeting of the licensing committee for the county borough of Sunderland held on September 20, 1900, six of the justices of the borough, being the majority of the members of the licensing committee appointed for the borough then present, did thereby grant to John Duncan a provisional grant authorizing him, after those presents and the order of confirmation thereunder written should have been declared to be final by an order of the licensing justices of the borough to be made in pursuance of the 22nd section of the Licensing Act, 1874, to apply for and hold any of the excise licences that may be held by a publican for the sale by retail in the premises in question of all intoxicating liquors to be consumed on the premises. By the confirming order it is stated that, at a special sessions of the justices of the county borough of Sunderland, eight of the said justices, being the majority of those then assembled, did thereby confirm the within provisional grant. It is said on behalf of the appellants that certain of the justices, as well those making the provisional grant as those making the order confirming it, were incapacitated from sitting on the bench by reason of the existence of a bias on their part. It appears to me that, in cases where the decision of justices is impeached on the ground of a bias such as is suggested in the present case, the decision must really turn on the question of fact, whether there was or was not under the circumstances a real likelihood that there would be a bias on the part of the justices alleged to have been so biassed. If there is such a likelihood, then it is clearly in accordance with natural justice and common sense that the justices likely to be so biassed should be incapacitated from

sitting. I will presently refer to authorities, in order to shew what the rule of law on the subject is, but, before doing so, I think it is desirable to state shortly the facts of the present case. It appears that, a certain street in Sunderland being too narrow for the requirements of the traffic, the corporation decided to widen it. There was, however, fronting the street a large hotel called the Londonderry Hotel, and, as long as that stood, the street could not be widened as proposed. For the purpose of carrying out the scheme for improving the street, the corporation purchased that hotel for 14,600*l.* In the first instance it seems to have been proposed that arrangements should be made for the erection of a new hotel on that part of the site of the Londonderry Hotel which was not required for widening the street, but nothing came of that proposal. An arrangement which was afterwards suggested, and which did take effect, was as follows. A brewery company, called Duncan & Dalgleish, Limited, were willing to pay the corporation 10,000*l.*, if they would not apply for a renewal of the licence in respect of the Londonderry Hotel, and if the company could obtain a licence in respect of a hotel which they proposed to erect in Pallion Road, to be called the Pallion Hotel; and it was suggested to the borough council that it would be a very advisable thing, in the interests of the borough, that the corporation should get this arrangement carried out, and so recoup to the borough part of the sum of 14,600*l.*, which they had been obliged to expend in the purchase of the Londonderry Hotel. There is strong evidence that certain members of the borough council, who, being justices, afterwards sat at the licensing meeting, and as members of the confirming authority, took a very keen and lively interest in getting the agreement, by which this arrangement was carried into effect, adopted by the corporation. It is impossible to read the report of the speech made by the chairman of the highways committee, at the meeting of the borough council at which the question whether the agreement should be entered into was discussed, without seeing that he took an active interest in getting the proposed agreement adopted by the council. Another member of the council, who also was a justice for the borough, moved the resolution

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for acceptance of the tender made by Duncan & Dalgleish, Limited. Both these gentlemen, as well as other members of the borough council, subsequently sat on the licensing committee, when the licence in respect of the brewery company's premises in Pallion Road was granted, and again, as members of the confirming authority, when it was confirmed. Having regard to the evidence, I think it is impossible to avoid coming to the conclusion that these gentlemen took a lively interest in getting Duncan & Dalgleish, Limited, bound by the agreement, the effect of which was that they were to pay to the corporation 10,000*l.*, if they could obtain a licence for the Pallion Hotel from the licensing authorities, the corporation undertaking in that event to allow the licence in respect of the Londonderry Hotel to lapse, but, unless the licence for the Pallion Hotel were obtained, no 10,000*l.* would come to the corporation. It is contended on behalf of the applicants for the certiorari that these gentlemen, who had taken such a lively interest in getting the agreement between the corporation and Duncan & Dalgleish, Limited, entered into, were biassed within the rule by which justices are disqualified from sitting in cases where they have a real bias in respect of the matter to be determined. I desire to say nothing which might involve any imputation whatever upon the conduct of these gentlemen in acting as they did: the sole question is whether they came within the rule of law by which under certain circumstances justices are disqualified from acting on the ground of the probability of bias.

What is the rule on that subject? If the justice acting is pecuniarily interested, there clearly is a bias which disqualifies him. There is, however, no question of any personal pecuniary interest in this case. Then what is the rule with regard to bias in cases other than those in which there is a pecuniary interest on the part of the justice? In *Reg.* v. *Rand* (1) Blackburn J., who delivered the judgment of the Court, after stating that in cases where there was a direct pecuniary interest in the subject of inquiry, however small, that no doubt disqualified a person from acting as a judge in any matter, but that in

(1) L. R. 1 Q. B. 230.

the case before the Court there was no such interest in the justices alleged to be biassed, proceeded to say: "But the only way in which the facts could affect their impartiality would be that they might have a tendency to favour those for whom they were trustees; and that is an objection not in the nature of interest, but of a challenge to the favour. Wherever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act: and we are not to be understood to say that, where there is a real bias of this sort, this Court would not interfere." Applying the rule so laid down to the facts of the present case, I cannot say that there was not a real likelihood that those gentlemen who had taken so lively an interest in getting the agreement entered into, by which the brewery company were to pay to the corporation 10,000*l.*, if a licence were granted to the company, would have a bias in favour of the brewery company's getting their licence. In the case of *Reg.* v. *Meyer* (1), in which *Reg.* v. *Rand* (2) was cited, the same learned judge said: "The disqualification in the present instance is not on the ground of pecuniary interest. The question is, Was Mr. Meyer really substantially interested, though not in a pecuniary sense, in the proceedings as to which these informations were one step, so as to be likely to have a real bias in the matter? Now it is impossible to read Mr. Harrison's affidavit, which is really and substantially uncontradicted, without seeing that Mr. Meyer had such an interest. In the case of a justice having any pecuniary interest, the Court was compelled to quash the conviction; but, though disqualifying interest is not confined to pecuniary interest, the interest, if not pecuniary, must be substantial. In *Reg.* v. *Rand* (2) we held that there was no ground for quashing the certificate of the justices. The effect of our judgment in that case was that, though pecuniary interest in the subject-matter of dispute, however small, disqualifies the justices, yet the mere possibility of bias did not ipso facto avoid the justices' decision; and we thought that, though there was a possibility of bias in that case, yet it was not real; but we expressly excepted a real bias, saying 'that we must not be understood to say that,

(1) 1 Q. B. D. 173. (2) L. R. 1 Q. B. 230.

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where there was a real bias, this Court would not interfere.' In the present case there is such a real bias." I have already said what I think to be the proper inference of fact to be drawn from the circumstances of the present case as to the real likelihood of the existence of a bias on the part of these justices. In the case of *Reg.* v. *Hain* (1), the rule with regard to disqualification by reason of bias was stated in terms which appear to be, if anything, somewhat wider than those in which it was stated in *Reg.* v. *Meyer.* (2) The case of *Reg.* v. *Cumberland Justices* (3), which I will not refer to in detail, appears to go a considerable distance in support of the judgment which we are now giving, to the effect that persons who had interested themselves as these gentlemen did, in reference to the agreement between the corporation and the brewery company, had thereby incapacitated themselves from afterwards sitting upon the hearing of the application by the brewery company for a licence. It is hardly necessary to point out how very important it is that persons who have to exercise judicial functions with regard to any matter should not lay themselves open to any suggestion of bias on their part. I desire to add with regard to this point that I do not see how the Divisional Court could have decided otherwise than they did having regard to the decision in *Reg.* v. *Stockport Justices* (4); but we are not bound by that case, and I do not myself think that it was correctly decided.

It was argued for the respondents that a writ of certiorari would not lie in a case such as the present. Before the decision in *Boulter* v. *Kent Justices* (5) the practice appears to have been to bring up such orders by certiorari, but it is contended that the judgment of the House of Lords in that case shews that this cannot now be done. I see no ground for extending the effect of that decision to the present case. The decision in *Boulter* v. *Kent Justices* (5) related only to proceedings before the licensing meeting. The House of Lords held that the licensing meeting was not a court of summary jurisdiction; and possibly it may follow, therefore, that a certiorari would not lie to bring

(1) 12 Times L. R. 323.
(2) 1 Q. B. D. 173.
(3) 4 Times L. R. 294.
(4) 60 J. P. 552.
(5) [1897] A. C. 556.

up proceedings before the licensing meeting. In the case of *Reg.* v. *Manchester Justices* (1) Channell J. held that a certiorari would lie to bring up an order made by justices as the confirming authority under the Licensing Acts. I agree with him in the conclusion at which he there arrived and in the grounds which he gave for it. Apart from *Boulter* v. *Kent Justices* (2), I think it would be clear that a certiorari would lie in this case, and, as I have said, the decision in that case did not apply to proceedings before the justices as confirming authority. There is this great distinction between proceedings before the licensing meeting and those before the justices as confirming authority. At the former, there are really no parties between whom there is a litigation, but, with regard to the proceedings before the confirming authority, we find that by s. 43 of the Licensing Act, 1872, it is provided that "any person who appears before the licensing justices and opposes the grant of a new licence, and no other person, may appear and oppose the confirmation of such grant by the confirming authority in counties or boroughs, and the confirming authority may award such costs as they shall deem just to the party who shall succeed in the proceedings before them." It appears to me that in that enactment the Legislature expressly treats the matter as being in the nature of a litigation between parties, and provides that costs as of a litigation may be awarded to the successful party. It was argued that there was really no order of the confirming authority which could be brought up and quashed. I do not agree with that contention. Though in form the order may, for the sake of brevity, merely state that the justices confirm the provisional grant of a licence by the licensing committee, in substance it is an order of the confirming authority that the licence shall be granted. For these reasons I think that the appeal should be allowed, and that the rule for a certiorari should be made absolute.

VAUGHAN WILLIAMS L.J. I agree. I am not at all clear that the Divisional Court could have arrived at any other decision than they did, because they were bound by the

(1) [1899] 1 Q. B. 571. (2) [1897] A. C. 556.

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decision in *Reg.* v. *Stockport Justices* (1), and the counsel for the appellants admitted that that case could not be distinguished from the present. We are not bound by that decision, and must determine the question involved for ourselves.

I will deal first with the objection that a certiorari will not lie in such a case as this. It would be sufficient to say that on that point I agree with the decision of Channell J. in the case of *Reg.* v. *Manchester Justices* (2) and with the reasons given by him for that decision. He there points out that, whatever may have been decided in *Boulter* v. *Kent Justices* (3), that decision applies only to proceedings before the licensing meeting, and has no application to the proceedings of justices as a confirming authority. When one looks at s. 43 of the Licensing Act, 1872, and finds that the Legislature has there made provisions with regard to the persons who may appear to oppose the confirmation of the licence, and that the confirming authority may award costs to the party who succeeds in the proceedings before them, it appears to me impossible to say that there is not before that authority a "lis" with parties thereto, and that, however strictly the line may be drawn with regard to the applicability of a writ of certiorari, such a writ will not lie in the case of proceedings before the confirming authority under that section. But, speaking for myself, I wish to go further, and to say that I do not think that it necessarily follows from the decision in *Boulter* v. *Kent Justices* (3) that a writ of certiorari will not lie in respect of proceedings before the licensing meeting, on the ground that a certiorari will only lie to bring up the order of a Court properly so called. It is not necessary to decide this point, but I can only say, speaking for myself, that, having regard to the general principles of the common law, I should have been disposed to think that, wherever a body such as justices have under the provisions of a statute to grant or withhold a certificate, such as a certificate for a licence, and it appears from the statute that they have to exercise a judicial discretion in so doing, a certiorari would lie to bring up the proceedings before them, in the case of

(1) 60 J. P. 552. (2) [1899] 1 Q. B. 571.
(3) [1897] A. C. 556.

erroneous exercise or excess of jurisdiction, whether they could or could not be said to have acted as a Court in the strict sense of the term.

Having said so much with regard to the question whether a certiorari will lie, I will add a few observations on the merits of the case. I think that this is happily not one of those cases in which one has to deal with decisions that are conflicting or difficult to reconcile, for I think that the series of authorities on the subject are really quite harmonious. It appears to me that the whole law on the subject may really be found laid down in the cases of *Reg.* v. *Rand* (1) and *Reg.* v. *Meyer*. (2) When is it, according to those decisions, that a judge or a justice is disqualified from sitting on the ground of bias? If he has personally a pecuniary interest or an interest capable of being measured pecuniarily, the law raises a conclusive presumption of bias. For reasons of policy, which hardly require explanation, it is not thought convenient, where there is such an interest, to go into the question whether he in fact acted partially or impartially. A bias is presumed from the mere fact of the existence of the interest. This is not a case of that kind. The utmost that could be said here is that the justices in question had a pecuniary interest as trustees for the ratepayers. But I do not think that upon the authorities such an interest is sufficient per se to raise the presumption of bias. Then is there any other case of an interest, besides that of a personal pecuniary interest, which creates a disqualification on the ground of bias? The judgment in *Reg.* v. *Rand* (1) clearly shews that there is another case, namely, that in which the objection is not on the ground of pecuniary interest, but in the nature of a challenge to the favour. In such a case there is no such presumption as arises in the case of a pecuniary interest, but the question is whether there is a real likelihood, arising from circumstances such as would give rise to a challenge to the favour, that the judge or justice would have a bias. That being the question to be answered, what are the facts of the present case? The corporation, being desirous of widening a street in the borough, had for that purpose purchased the Londonderry Hotel for 14,600*l.*, intending to throw

(1) L. R. 1 Q. B. 230. (2) 1 Q. B. D. 173.

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a portion of its site into the street. The corporation being unable themselves to carry on a hotel on the remainder of the site, but having practically what was a valuable asset to dispose of in respect of the licence, appear to have invited tenders from brewers and others in the district for what has been called a surrender by the corporation of that licence. The term "surrender of the licence" is not strictly accurate, because the only possible advantage that could be gained by the person tendering, and whose tender was accepted, was that the corporation undertook not to apply for a renewal of the licence, and to pull down the Londonderry Hotel, so that he could, when applying for a licence for another hotel, urge in support of his application that the grant of a licence to him would not increase the number of licences in the borough. It is clear from what took place at the meetings of the borough council that the corporation were well aware that there were several persons desirous of opening a hotel in the Pallion district, and that there would be a competition for a licence in that district; and under those circumstances negotiations were entered into, and an agreement was ultimately made by the corporation with Duncan & Dalgleish, Limited, under which a sum of 10,000*l.* was to be paid by the company to the corporation, only if and when a licence for the Pallion Hotel was granted to them by the licensing committee, and confirmed, which sum was to be returned, if the licence were quashed by proceedings in the High Court. The question is whether the members of the borough council who were actively engaged in negotiating and bringing about this agreement were disqualified by reason of bias from sitting as justices on the application for the confirmation of the grant of the licence to Duncan & Dalgleish, Limited: in other words, one has to ask oneself whether, under the circumstances, there was a real likelihood that these justices, by reason of the part which they took in the negotiations for the agreement, would have a bias in favour of the application for a licence for the Pallion Hotel. To my mind it is not possible to draw any other conclusion from the facts than that there was such a likelihood. The substance of the law on the subject is stated by Blackburn J. in *Reg.* v. *Meyer*. (1)

(1) 1 Q. B. D. 173.

The effect of what he there said appears to be that, where there is no pecuniary interest, mere possibility or suspicion that a judge or justice may be biassed is not sufficient, as is shewn by *Reg.* v. *Dean of Rochester* (1): he must be substantially interested in the proceedings, so as to have a real bias. Can it be said here that there was nothing more than a mere possibility or suspicion that these justices would be biassed? We must judge of this matter as a reasonable man would judge of any matter in the conduct of his own business. Can one doubt that a reasonable man as a matter of business would, under the circumstances of this case, infallibly draw the inference that the justices who had negotiated and brought about this agreement would have a real bias in favour of granting the licence to Duncan & Dalgleish, Limited, the parties to it? I entirely agree with what the Master of the Rolls has said on the subject, and should not have added anything except for the fact that the case is one of considerable importance, and we are in point of form overruling the judgment of the Divisional Court.

STIRLING L.J. I am of the same opinion. The question which we have to determine is, I apprehend, that stated by Blackburn J. in delivering the judgment of the Queen's Bench in *Reg.* v. *Rand* (2), namely, was there in this case such an interest on the part of the justices whose decision is impugned as to create a real likelihood that they would have a bias in favour of the applicant for confirmation of the licence? The nature of such an interest is indicated by the reference of the learned judge to the bias of a man in favour of kindred, which he mentions by way of illustration. The facts alleged to give rise to a bias in the present case are as follows. An agreement was entered into between the Corporation of Sunderland of the one part and Duncan & Dalgleish, Limited, a brewery company, of the other part, by which it was agreed that, in the event of the latter succeeding in an application for a licence for their premises in Pallion Road, they would pay to the corporation a sum of 10,000*l.*, the consideration on the

(1) (1851) 17 Q. B. 1. (2) L. R. 1 Q. B. 230.

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part of the corporation being an agreement that, upon that payment and the new hotel being opened, the Londonderry Hotel should be closed, and no application for a renewal of the licence in respect thereof should be made. The agreement also contained a stipulation that, if the grant of the licence to Duncan & Dalgleish, Limited, should be revoked by proceedings in the High Court, the 10,000*l.* should be returned to them by the corporation. The Londonderry Hotel had become the property of the corporation in this way. They were engaged in a street improvement in the borough for the purpose of which part of the site of that hotel was required, and therefore it was necessary for the corporation to buy the hotel, which they accordingly did, paying for it a sum of 14,600*l.*, which included the value of the licence. The corporation naturally made attempts to dispose of so much of the site as was not required for the street improvement for the purposes of a hotel, but those attempts failed; and ultimately, after considerable negotiation, the agreement to which I have referred was entered into. A report of the proceedings at the meeting of the borough council at which it was resolved that the agreement should be entered into by the corporation has been made evidence in the case. Looking at that report, it is impossible not to see that the question whether or not the agreement should be entered into was a matter of keen interest to the members of the council then present. Among those who took an active part at that meeting were the chairman of the highways committee and the member of the council who moved that the agreement should be entered into. At the close of the discussion the chairman of the highways committee put forcibly before the meeting reasons which appeared to him weighty in favour of the acceptance of the agreement by the corporation. He asked the meeting whether as trustees for the ratepayers they were going to throw away the chance of getting the sum of 10,000*l.*, which was to be paid under the agreement. The matter was then put to the vote, and the proposal to enter into the agreement was carried. The question of the grant of a licence to Duncan & Dalgleish, Limited, then had to come before the licensing

authorities. First it came before the licensing committee, which consisted of six justices, five of them being members of the borough council, among whom were the chairman of the highways committee and the member of the council who moved that the agreement should be entered into by the corporation. At the meeting of that committee the application for the grant of a licence to Messrs. Duncan & Dalgleish, Limited, upon which the whole agreement hinged, was granted by a majority. Again, at the sitting of the confirming authority, thirteen justices were present, among whom were the gentlemen I have before mentioned as taking an active part in getting the agreement entered into, and again the application for the grant of the licence was carried by a majority. The question which, upon these facts, we have to consider, has already been stated. We have to apply our minds, like jurymen, to the question of fact, whether there was a real likelihood that the justices were biassed. I think the answer must be in the affirmative. Having regard to the active part taken by them in procuring the agreement, and the obvious interest shewn by them on the discussion of the matter before the borough council, I cannot but think that the securing of this sum of 10,000*l.* for the benefit of the ratepayers was a matter which would be likely to weigh with them in dealing with the question whether the licence should be granted to Duncan & Dalgleish, Limited. Therefore, so far as the merits of the case are concerned, I agree with the view taken by the other members of the Court. With regard to the technical question whether a writ of certiorari will lie in this case, I do not desire to add anything to that which has been already said.

Appeal allowed.

Solicitors for appellants: *Hickin, Smith & Capel-Cure, for J. S. Nicholson, Sunderland.*

Solicitors for justices: *Tufnell Southgate & Son, for C. W. P. Barker, Sunderland.*

Solicitors for Duncan & Dalgleish, Limited: *J. E. & H. Scott, for William Bell & Sons, Sunderland.*

E. L.

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April 23.

SNEATH *v.* TAYLOR.

Adulteration — Food and Drugs—Certificate of Analysis, Sufficiency of — Insertion of Weight of Sample — Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 18.

The insertion in the certificate given by a public analyst under the Sale of Food and Drugs Act, 1875, of the weight of the sample analyzed is obligatory only where the weight of the sample is material to the accuracy of the analysis, and its omission does not necessarily invalidate the certificate where the accuracy of the analysis does not in any way depend upon the weight of the sample.

CASE stated by justices for the county of Lincoln.

An information had been preferred under s. 6 of the Sale of Food and Drugs Act, 1875, by the respondent against the appellant, charging him with having unlawfully sold to the prejudice of the purchaser butter which was adulterated with 15 per cent. of margarine and was not of the nature, substance, and quality demanded by the purchaser. Upon the hearing before the justices the appellant was convicted and fined.

The appellant was an assistant to a firm of wholesale and retail grocers at Sleaford, and the respondent was an inspector under the Sale of Food and Drugs Act, 1875. The respondent had purchased of the appellant at his employers' shop one pound of butter for the purpose of analysis, and at the time of sale had divided the butter into three parts, one of which he submitted to the public analyst for analysis. At the hearing the certificate of the public analyst purporting to be the result of his analysis was tendered in evidence in support of the prosecution, but was objected to on behalf of the appellant on the ground that the weight of the sample received by the public analyst to be analyzed was not stated in the certificate, and that the certificate was therefore not in the form prescribed by s. 18 of the Act. The certificate declared the result of the analysis to be that the sample contained 15 per cent. of margarine and 85 per cent. of butter, and contained the observation that no change had taken place in the constitution of the sample that would interfere with the analysis or affect

the result as stated. No evidence of adulteration was tendered in support of the prosecution other than the analyst's certificate. A copy of this certificate was served with the summons.

It was contended on behalf of the appellant that the sample could have been conveniently weighed; that the weight of the sample not being stated the certificate was not in the form required by s. 18 and was invalid, and that therefore the respondent had not complied with s. 19 of the Sale of Food and Drugs Act, 1899, which requires a copy of the certificate to be served with the summons.

The respondent contended that the omission in the certificate of the weight of the sample was immaterial, that the certificate was in the required form and valid, and that the service with the summons of a copy of that certificate was a compliance with the requirements of s. 19.

The contention of the appellant that the sample could have been conveniently weighed was not contested by the respondent; there was no expert evidence before the justices that it could have been done, but there was uncontested evidence before them that approximately a third of a pound of butter was sent for analysis.

The justices held that the omission in the certificate of the weight of the sample was immaterial; that the certificate was in the form required by s. 18 of the Act of 1875, and was valid and admissible in evidence; and that service of a copy of that certificate with the summons was a compliance with s. 19 of the Act of 1899.

The question for the opinion of the Court was whether they were right in law in holding that, notwithstanding the omission of the weight of the sample, the certificate of the public analyst was in the form required by s. 18 of the Act of 1875, and that it was valid and admissible in evidence, and whether, having regard to the form of the certificate, they were right in holding that s. 19 of the Act of 1899 had been complied with by the service of a copy of that certificate with the summons.

Bonsey, for the appellant. The certificate, which was the only evidence of adulteration, was invalid by reason of the omission

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of the weight of the sample received for analysis. Sect. 18 provides that the certificate is to be in the form set forth in the schedule to the Act, or to the like effect, and the form uses the words "which then weighed." Those words are more than directory, and make the insertion of the weight of the sample a condition precedent in ordinary cases to the validity of the certificate. It is true that a note to the form says that "when the article cannot be conveniently weighed, this passage may be erased, or the blank may be left unfilled"; but there is no evidence in the present case that there was anything to prevent the sample of butter being weighed. Under s. 19, sub-s. 2, of the Sale of Food and Drugs Act, 1899, a copy of the certificate has to be served with the summons: this is to enable both the Court and the defendant to satisfy themselves that there was a sufficient quantity to enable a proper analysis to be made. Under the Act a person may be convicted, although acting honestly and without any knowledge of the adulteration of the article sold; the Act should therefore be construed strictly and its requirements strictly complied with. [He cited *Fortune* v. *Hanson* (1); *Bridge* v. *Howard* (2); *Peart* v. *Barstow*. (3)]

W. H. Leese, for the respondent. The certificate was valid, notwithstanding the omission of the weight of the sample. The question whether the sample can be conveniently weighed must be left to the analyst's discretion. The mere fact that he did analyze the sample and give a certificate of the result is evidence that there was sufficient butter for the purpose of analysis. Besides, under s. 21 the defendant can require the analyst to be called as a witness.

[He was stopped by the Court.]

Bonsey, in reply. The power given to a defendant to insist on the analyst being called was to enable him to dispute the correctness of the analysis: the analyst cannot be called to supplement the deficiencies of his own certificate. The question of whether a sample can be conveniently weighed cannot be left to the uncontrolled discretion of the analyst, for there are no means of reviewing his decision.

(1) [1896] 1 Q. B. 202. (2) [1897] 1 Q. B. 80.
(3) (1880) 44 J. P. 699.

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LORD ALVERSTONE C.J. The real question raised by this appeal is whether the words "which then weighed" in the form of the analyst's certificate given in the schedule to the Sale of Food and Drugs Act, 1875, are obligatory, so that the certificate is invalid if they are omitted, or whether they are merely directory. It is plain that, where the weight of the sample is material, the words must not be omitted and the weight must be filled in. But we cannot decide as a matter of law that, where it is not shewn to the justices that the weight of the sample is in any way material, it is necessary to fill in the words. A certain latitude is necessarily given to the analyst, for the note at the foot of the form says: "when the article cannot be conveniently weighed, this passage may be erased, or the blank may be left unfilled."

It is urged on behalf of the appellant that the words must be filled in unless the sample cannot be conveniently weighed, and that as butter can be conveniently weighed, the weight should have been filled in in the certificate. If I thought that the accuracy of the analysis of the butter depended in any way upon the weight of the sample, and if the certificate did not give the necessary information to enable the Court to judge of the accuracy of the analysis, I should have come to a very different conclusion to that to which I have in fact come. The direction as to insertion of the weight is intended to apply to ordinary cases; but I cannot say that the mere omission of the weight of the sample in the present case, having regard to the discretion given to the analyst, necessarily invalidates the certificate. This appeal must therefore be dismissed.

LAWRANCE J. I am of the same opinion.

Appeal dismissed.

Solicitors for appellant: *Trass & Enever, for Godson, Sleaford.*

Solicitors for respondent: *Peacock & Goddard, for Phillips, Lincoln.*

W. J. B.

1901
May 9.

DIERKEN *v.* PHILPOT.

County Court—Jurisdiction—Remitted Action—Invalid Order to Remit not appealed against—Objection to Jurisdiction at Trial—Prohibition—County Courts Act, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 65—*County Court Rules, Order* XXXIII., *r.* 1.

By the County Courts Act, 1888, s. 65, where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed 100*l.*, or where such claim, though it originally exceeded 100*l.*, is reduced by payment, an admitted set-off or otherwise, to a sum not exceeding 100*l.*, an order may be made for the trial of the action in a county court.

In an action of contract brought in the High Court, in which the sum indorsed on the writ exceeded 100*l.*, the plaintiff at the hearing by a master of a summons under the above section abandoned the excess above 100*l.*, and the master made an order for trial of the action in the county court. The defendant did not appeal against the order, but at the trial in the county court objected to the jurisdiction; the judge, considering himself bound by the order, tried the action and gave judgment for the plaintiff; the defendant thereupon applied for a writ of prohibition:—

Held, (1.) that the master's order was improperly made, the excess not having been abandoned before the issue of the writ in the High Court; but (2.) that, the defendant not having appealed against the order, the objection raised at the trial was made too late, and the county court judge was not bound to inquire into the circumstances under which the order was made, and was not guilty of any excess of jurisdiction in trying the action.

APPEAL from an order made by Day J. at chambers for a writ of prohibition to issue directed to the judge of the Westminster County Court and to the plaintiff in the action.

The action was originally brought in the High Court, the writ, which was issued in June, 1900, being indorsed with a claim for 116*l.* for arrears of salary and for money paid. In the following October a summons was taken out by the plaintiff to remit the action to the Westminster County Court under the powers given by s. 65 of the County Courts Act, 1888. (1)

(1) By 51 & 52 Vict. c. 43 (The County Courts Act, 1888), s. 65, "Where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed one hundred pounds, or where such claim, though it originally exceeded one hundred pounds, is reduced by payment, an admitted set-off, or otherwise to a sum not exceeding one hundred pounds, it shall be lawful for either party to the action, at any

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Upon the hearing of the summons before the master the excess of 16*l.* was abandoned by the plaintiff, and the master made the order remitting the action to the county court; no appeal was brought by the defendant against this order. The writ and order were thereupon lodged with the registrar of the county court as required by the section, together with "a concise statement of the particulars of claim, such as would be required upon entering a plaint" in accordance with the provisions of Order XXXIII., r. 1, of the County Court Rules (1); these particulars shewed that the excess of 16*l.* had been abandoned, and that the plaintiff's claim was limited to 100*l.* When the action came on for trial in the county court in March, 1901, the defendant objected to the jurisdiction of the county court judge to try the action on the ground that the excess should have been abandoned before the issue of the writ in the High Court, and that the order remitting the action to the county court was therefore made without jurisdiction and was bad; the learned county court judge was, however, of opinion that he was bound to obey the order; he therefore

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time, if the whole or part of the demand of the plaintiff be contested, to apply to a judge of the High Court at chambers, to order such action to be tried in any Court in which the action might have been commenced, or in any Court convenient thereto; and on the hearing of the application the judge shall, unless there is good cause to the contrary, order such action to be tried accordingly; and thereupon the plaintiff shall lodge the original writ and the order with the registrar of the Court mentioned in the order, who shall appoint a day for the trial of the action, notice whereof shall be sent by post or otherwise by the registrar to both parties or their solicitors, and the action and all proceedings therein shall be tried and taken in such Court as if the action had been originally commenced therein. . . . ."

(1) By the County Court Rules, 1889, Order XXXIII., r. 1, "Where, by order of the High Court of Justice, any action or matter is remitted or transferred to a county court, the plaintiff shall lodge with the registrar thereof the order, or a duplicate thereof, and the writ, together with the pleadings, affidavits, and other documents filed in the High Court, or copies thereof, and also a copy or copies of any affidavit or affidavits on which the order was made, and also a statement of the names and addresses of the several parties to the action or matter, and their solicitors, if any, and a concise statement of the particulars of claim, such as would be required upon entering a plaint, signed by the plaintiff or his solicitor, and the registrar shall thereupon enter the action or matter for trial. . . . ."

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tried the action, which resulted in a judgment for the plaintiff for 100*l.* and costs. The defendant thereupon commenced proceedings to obtain a writ of prohibition to restrain all further proceedings in the action, and Day J. directed the writ to issue.

The plaintiff appealed.

C. H. Lindon, for the plaintiff. First, the order remitting the action to the county court was valid. The power to remit under s. 65 is given where the claim, though it originally exceeded 100*l.*, is reduced to that amount by payment, an admitted set-off, or otherwise; the present claim was "otherwise" reduced by abandonment of the excess. It was sufficient that the excess should be abandoned before the master upon the hearing of the summons to remit. It is true that in *Hodgson* v. *Bell* (1) the Court of Appeal held that "payment" in s. 65 meant payment before action, and that there was therefore no jurisdiction to remit an action under that section to the county court where the claim was reduced to a sum not exceeding 100*l.* by a payment made in pursuance of a judgment under Order XIV. after action brought. But the principle of that decision should not be extended to a case not strictly within its terms. Secondly, the county court judge was bound by the master's order to hear the action; a refusal to obey such an order, which is good upon its face, is properly the subject of a mandamus to compel the county court judge to hear the case: *Blades* v. *Lawrence*. (2) Thirdly, the defendant has been guilty of laches disentitling him to a writ of prohibition. He could have appealed against the master's order, or, upon the entry of the case in the county court, he could have applied for a writ of prohibition; he did neither, but waited until the case was called on for hearing before taking his objection. Fourthly, the order of Day J. was clearly wrong in ordering plaintiff to pay defendant's costs of the action; after remittal the High Court can make no order as to costs: *Harris* v. *Judge* (3); *Duke* v. *Davis*. (4)

(1) (1890) 24 Q. B. D. 525.
(2) (1874) L. R. 9 Q. B. 374.
(3) [1892] 2 Q. B. 565.
(4) [1893] 2 Q. B. 260.

Lewis Thomas, for the defendant, was directed to confine his argument to the point that no appeal had been brought against the master's order. The defendant was guilty of no laches; the fact that the order was not appealed against is not a reason for refusing a writ of prohibition to prevent a county court from exceeding its jurisdiction. A county court judge is not bound to obey a master's order remitting the action on pain of being compelled by a writ of mandamus to try the case: *Reg.* v. *City of London Court.* (1)

[LORD ALVERSTONE C.J. In that case the plaintiff had discontinued the action, and therefore there was no jurisdiction to remit the counter-claim.]

Under Order XXXIII., r. 1, the original writ is lodged in the county court, and therefore the county court judge had before him the materials necessary to shew his want of jurisdiction. The writ must go, if the jurisdiction is exceeded: *Mayor of London* v. *Cox.* (2) [He also cited *Gray* v. *Hopper.* (3)]

Lindon, in reply.

LORD ALVERSTONE C.J. This case is not free from difficulty, but after careful consideration I have come to the conclusion that the writ of prohibition ought not to have issued. Although, of course, the defendant's counsel has not been heard upon the point, I am of opinion that the master ought not to have made the order remitting the action to the county court, upon the ground that, under the decision of the Court of Appeal in *Hodgson* v. *Bell* (4), the reduction must be so made that the reduced claim appears upon the writ in the High Court. Therefore, if the point was in fact taken before the master, I think that the action should not have been remitted. But it must be remembered that the parties might have consented to try in the county court, and further (and this is most important), that when the case came before the county court judge for trial he had before him the particulars delivered under Order XXXIII., r. 1, shewing upon the face of them the abandonment of the excess. I think that under the circumstances it was too late

(1) [1891] 2 Q. B. 71.
(2) (1867) L. R. 2 H. L. 239.
(3) (1888) 21 Q. B. D. 246.
(4) 24 Q. B. D. 525.

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for the defendant then to take the objection; he had the right to appeal against the master's order, but he allowed the time for appealing to go by, and sought to raise the point at the trial. Such a course of action obviously tends to put both the judge and the plaintiff in a difficulty; if the defendant's contention is right, it involves the necessity of a preliminary inquiry by the county court judge at the trial as to whether the master's order was made under such circumstances as to be binding upon him. There being an opportunity of appealing against the order of which the defendant did not choose to avail himself, I do not think we ought to prohibit the county court judge after he has in fact tried the action. I agree with the defendant's counsel that where there is excess of jurisdiction at any time a writ of prohibition may issue; but I do not think that there was in this case any excess of jurisdiction when the matter was before the county court judge. It was contended that the county court judge had the original writ before him, and that he could see from it that the claim indorsed was for 116*l.*, and that therefore there must be excess of jurisdiction in trying the case in the county court. But it is to place an undue burden upon a county court judge if he is to be compelled to decide whether or not he shall obey an appealable order against which no appeal has been brought; we have, therefore, under such circumstances a discretion to say whether a writ of prohibition ought to issue on the ground that the county court judge ought to have declined jurisdiction; and I am clearly of opinion that the learned judge at chambers ought to have declined to order the writ to issue. The appeal must, therefore, be allowed.

LAWRANCE J. I am of the same opinion.

Appeal allowed.

Solicitors for plaintiff: *G. B. Howard & Son.*
Solicitor for defendant: *Robert Todd.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1901
June 11.

HUMPHRYS *v.* POLAK AND WIFE.

Parent and Child—Illegitimate Child—Void Contract—Contract by Mother to give up Possession of Child—Contract to relieve Mother of Responsibility for Maintenance of Child.

A contract between the mother of an illegitimate child and another person for the transfer to that person of the rights and liabilities of the mother in respect of the child is invalid.

APPEAL from an order of Day J. at chambers, affirming an order of a master striking out a statement of claim as after mentioned.

The action was for damages for breach of the after-mentioned contract. The statement of claim stated that the plaintiff was a single woman, and the mother of an illegitimate female child; that on or about July 14, 1900, in consideration that the plaintiff would place and leave in the defendants' possession the said child for the period of one month on trial, and, in the event, after the expiration of the said month, of the defendants' approving the said child and determining to keep her, the plaintiff would still allow her to remain in the defendants' possession after the expiration of the said month, the defendants promised and agreed with the plaintiff to maintain and bring up the said child, as though she were the defendants' own child, and for ever to relieve the plaintiff from all liability and responsibility in connection with the bringing up of the said child; that the plaintiff on the faith of the said agreement placed and left the said child in the possession of the defendants for the period of one month on trial, and after the expiration of the said month the defendants approved the said child and determined to keep her, and the plaintiff continued on the faith of the said agreement to allow the said child to remain in the possession of the defendants, and was always ready and willing in pursuance of the said agreement to allow the said child to remain in their possession; yet the

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defendants by letter dated November 28, 1900, refused any longer to maintain the said child; and that the plaintiff by reason of the defendants' said breach of agreement had been and would be put to expense in maintaining her said child.

An application was made by the defendants to a master at chambers under Order xxv., r. 4, for an order that the statement of claim should be struck out on the ground that it disclosed no reasonable cause of action, and that the action should be dismissed as frivolous. The master granted the application, and on appeal Day J. affirmed his order.

H. J. Turrell, for the plaintiff. If the statement of claim is fairly capable of being so construed as to express a contract which might be valid, the Court ought not summarily to strike it out and dismiss the action. It is submitted that the contract as stated alleges a good consideration, and a valid promise. It would appear that, apart from statutory enactment, the mother of an illegitimate child has no legal rights or duties in respect of the child any more than a stranger has: see per Maule J. in *In re Lloyd* (1); but statutes relating to the poor law have imposed on the mother the duty of maintaining the child up to the age of sixteen. So far as the mother of an illegitimate child has legal rights and duties in respect of the child, no doubt she cannot divest herself of them; but the contract as stated cannot and does not purport to divest her of them. The statement of claim does not allege as the consideration the transfer of the mother's right of possession of the child, if any, to the defendants, a consideration which cannot in law exist, but merely the actual giving of possession of the child to the defendants, which is itself a perfectly good and substantial consideration; because, the mother having once parted with the actual custody of the child, it would be a question of discretion whether a Court would afterwards order the child to be delivered again into the custody of the mother: see Custody of Children Act, 1891 (54 & 55 Vict. c. 3), ss. 1, 3, 5; *Reg.* v. *Nash* (2); *Barnardo* v. *McHugh* (3); *Reg.* v. *Gyngall.* (4)

(1) (1841) 3 M. & G. 547.
(2) (1883) 10 Q. B. D. 454.
(3) [1891] A. C. 388.
(4) [1893] 2 Q. B. 232.

It is not illegal or contrary to public policy that a parent, who has to go abroad or is unable from any other circumstance to maintain or take care of a child, whether legitimate or illegitimate, should make an agreement with other persons, whereby they agree to perform the parent's liability in that respect. Such an agreement would not be one for divesting the parent of his rights and responsibility in point of law in respect of the child. The statement that the defendants agreed to relieve the plaintiff of liability only means that they undertook as between themselves and the plaintiff that they would perform the duty which the law cast upon her, which is not illegal. If the case for the defendants is that the contract was based on an illegal consideration, because it involved a contract by the mother not to exercise her rights or duties with regard to the child, it is submitted that it is for them to set that up by way of defence, there being nothing in the contract as stated which necessarily involves such a consideration.

Montague Lush, for the defendants. The judgments of Lord Halsbury L.C. and Lord Herschell in *Barnardo* v. *McHugh* (1) shew that the mother of an illegitimate child has certain liabilities imposed upon her by statute in respect of the child, and, consequently, has certain corresponding rights. It is obvious upon the terms of this contract as stated that the whole basis and object of the arrangement made was that the plaintiff was to be divested of parental responsibility, and that the rights and liabilities of the plaintiff as the mother of the child were to be transferred to the defendants. That is a contract which cannot legally be made. There is no consideration in point of law for such a contract. What have the defendants got as the consideration for a contract by them to undertake the plaintiff's liability in respect of the bringing up of the child and for ever relieve the plaintiff of the same? On the assumption that the plaintiff had a legal right to the possession of the child, such a right in respect of a child cannot be transferred like a right in respect of a chattel; and therefore the defendants have only got the possession of the child for as long as the plaintiff chooses to allow them to keep it; and it is impossible

(1) [1891] A. C. 388, at pp. 395, 398.]

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to suppose that, as a matter of fact, that was what was intended by the parties to be the consideration for the contract. On the other hand, on the assumption that the mother has no legal right to the possession of the child, it is equally clear that there is no consideration for the contract.

H. J. Turrell, in reply.

VAUGHAN WILLIAMS L.J. I think that the order made at chambers was right. I do not say that there might not be an agreement by which a parent who was going abroad, or for some other reason was unable to take care of a child, might contract with other persons that they should take care of it, and that, if such a contract was made for good consideration, it might not be enforced in the event of a breach of it. We have not, however, and I do not propose, in the present case to deal with any abstract question, but only to consider whether the statement of claim in this particular case discloses any reasonable cause of action. The consideration stated in the earlier part of the statement of claim is that the plaintiff would, after a month's trial, still allow the child to remain in the defendants' possession, if they approved and determined to keep her after the expiration of the month. That statement is somewhat vague. If it means that the plaintiff contracted to allow the child to remain in the defendants' possession for ever, or until it grew up, I should be disposed to think it was an illegal consideration for a mother to make such a promise, because it might become contrary to the interest of the child that it should continue to remain in the defendants' possession. But it is not necessary, I think, to determine the exact meaning of that part of the statement of claim, because it goes on to allege, as the promise the breach of which is complained of, that the defendants promised and agreed with the plaintiff to maintain and bring up the said child as though she were their own child, and for ever to relieve the plaintiff from all liability and responsibility in connection with the bringing up of the said child. I am clearly of opinion that such a promise as that cannot be enforced in a court of law. I think that follows the moment one comes to the conclusion that the mother of

the child owed a duty, and had a legal responsibility, towards the child. That being so, the only question which I have to ask myself is whether the mother has a legal duty towards the child. In spite of the suggestion of Maule J. in the case of *In re Lloyd* (1) to the effect that the mother of an illegitimate child is in law in the position of a mere stranger to it, I am inclined to think that there was at common law a duty on the part of the mother towards such a child, and that the series of legislative enactments on the subject, such as the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 71, did not create that duty, but merely recognised and defined it. But, even if that be not so, those enactments did undoubtedly impose a duty on the mother in respect of her illegitimate child. It appears to me that the contract as alleged in this statement of claim is based entirely on the assumption that there is such a duty, and that the mother can by contract divest herself of it. In my opinion she cannot do so, and the cause of action which is based on that assumption is therefore not good. For these reasons I think the appeal must be dismissed.

STIRLING L.J. I am of the same opinion. The contract stated by the statement of claim is substantially that the plaintiff contracted with the defendants to allow her illegitimate child, if the defendants after a month's trial approved and determined to keep the child, to remain thenceforth in the possession of the defendants, they promising and agreeing to maintain and bring up the child as if it were their own, and to relieve the plaintiff from all responsibility for its bringing up and maintenance. Now, what is the position of the mother with regard to an illegitimate child? It is I think clear, from *Barnardo* v. *McHugh* (2), that the mother of an illegitimate child has by law imposed upon her obligations in respect of the child, and by reason of such obligations is vested by law with corresponding rights, one of which is the right primâ facie to the custody and possession of the person of the child. That right is given to the mother, not for the benefit or gratification of the

(1) 3 M. & G. 547. (2) [1891] A. C. 388.

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mother, still less as part of her property, but in order to enable her to discharge the duties which the law imposes on her in respect of the infant, and for its benefit. That being so, it is impossible that the plaintiff, who is the mother of the child, should divest herself of those rights in favour of another person. What is the bargain in this case as appearing from the statement of claim? It is in substance that the child is to remain in the possession of the defendants for the purpose of enabling the defendants to treat the child as their own and relieve the mother of all responsibility in connection with the bringing up of the child; in other words, the defendants were to undertake the duties which the law imposes on the mother, and to have the rights which the law gives her in relation to the child. In my opinion, the law does not permit such a transfer of the mother's rights and liabilities.

Appeal dismissed.

Solicitors for plaintiff: *Seeley & Son.*
Solicitors for defendants: *Bower & Parkes.*

E. L.

THE ATTORNEY-GENERAL *v.* BRUCE AND ANOTHER.

1901
May 6.

Revenue—Legacy Duty—Things given to be Enjoyed in Succession—Assignment by Person entitled in Expectancy—Persons having "an Absolute Interest therein," Who are—Legacy Duty Act, 1796 (36 *Geo.* 3, *c.* 52), *s.* 14.

By s. 14 of 36 Geo. 3, c. 52, no legacy duty shall be paid on articles or things not yielding any income, and given for the benefit of or to be enjoyed by different persons in succession, whilst the same shall be so enjoyed in kind only by persons not having any power of selling or disposing thereof so as to convert the same into money or other property yielding an income; but if the same shall come to any persons "having an absolute interest therein," then legacy duty shall be chargeable and paid thereon by those persons.

By the will of the second Marquis of Ailesbury certain articles and things were directed to be enjoyed as heirlooms by the person or persons for the time being beneficially entitled to the testator's mansion-house under the limitations of existing settlements. At the testator's death the mansion-house stood limited, under those settlements, to the use of the third Marquis for life, with remainder to the use of Viscount Savernake in tail male, with remainders over. Subsequently, by a resettlement made in the lifetime of the third Marquis, the estate tail in expectancy of Viscount Savernake was cut down to a life interest, with limitations over; and the heirlooms were assigned to trustees upon trust to allow them to go, devolve, and remain as heirlooms, together with the mansion-house, according to the limitations of the resettlement. Viscount Savernake died, having survived the third Marquis:—

Held, that the trustees of the resettlement were persons "having an absolute interest" in the articles and things within the meaning of s. 14, and were, therefore, liable to pay legacy duty in respect of them.

INFORMATION by the Attorney-General on behalf of the Crown for legacy duty.

The information stated the following material facts, which were admitted by the defendants:—

1. George William Frederick, second Marquis of Ailesbury, by his will, dated December 14, 1865, after appointing his wife and three other persons executors thereof, directed (inter alia) that certain chattels (being articles of plate, furniture, and other things specified and described therein) in or about the testator's mansion at Savernake Forest and the pleasure-grounds and gardens belonging thereto should be considered as

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annexed to the said mansion-house as heirlooms to be enjoyed by the person or persons for the time being beneficially entitled to the same mansion-house under the limitations contained in the settlement made on the testator's marriage in May, 1837, or subsequently upon or subsequent to the marriage of the testator's nephew George John Brudenell Bruce with Lady Evelyn Mary Craven, so long as the rules of law and equity should permit . . . .

2. The testator died on January 6, 1878, and his will was duly proved on April 5, 1878.

3. Under and by virtue of indentures of settlement, dated respectively May 10, 1837, and January 3, 1863 (being the settlements referred to in the will of the second Marquis), the said mansion-house at Savernake Forest, together with certain freehold estates, was settled and stood limited at the death of the second Marquis to the following uses (omitting limitations which failed): To the use of Ernest Augustus Charles Brudenell Bruce, third Marquis of Ailesbury for life, with remainder to the use of the first son of the marriage of the said George John Brudenell Bruce (who himself predeceased the testator) and Lady Evelyn Mary Bruce in tail male, with divers remainders over.

4. George William Thomas Brudenell Bruce (commonly called Viscount Savernake), afterwards fourth Marquis, was the first son of the said George John Brudenell Bruce.

5. By an indenture of resettlement, dated July 16, 1885, and made between Ernest, third Marquis of Ailesbury, of the first part, the said Viscount Savernake of the second part, and the defendant, Lord Frederick Bruce, and Hugh Mewburn Walker of the third part, in pursuance of an agreement therein mentioned between the third Marquis and Viscount Savernake, the mansion-house at Savernake and other freehold estates were appointed and granted by them to the following uses (so far as material to be here stated): To the use of the said Ernest, Marquis of Ailesbury, for life (by way of restoration of his former life estate) with remainder, to the use of the said Viscount Savernake for life with remainder, to the use of the first and every other son of the said Viscount Savernake suc-

cessively according to their respective seniorities in tail male with remainder, to the use of Lord Henry Brudenell Bruce, the then eldest surviving son of the said Ernest, Marquis of Ailesbury, for his life with remainder, to the use of George William James Chandos Brudenell Bruce, the first son of the said Lord Henry Brudenell Bruce, for his life with remainder, to the use of the first and every other son of the said George William Chandos Brudenell Bruce successively according to their respective seniorities in tail male with remainders over.

6. By the same indenture, and in pursuance of the said agreement between them, the said Ernest, Marquis of Ailesbury, and Viscount Savernake, as settlors, assigned to the said Lord Frederick Bruce and H. M. Walker, their executors, administrators, and assigns, all the chattels which by the will of the second Marquis of Ailesbury were directed to be maintained and to be considered as annexed to the mansion-house at Savernake Forest as heirlooms to be enjoyed by the person or persons entitled to the said mansion-house under the then existing settlements, to hold the same unto the said Lord Frederick Brudenell Bruce and H. M. Walker, their executors, administrators, and assigns, upon trust to allow the same to go, devolve, and remain as heirlooms, together with the premises thereinbefore expressed to be thereby appointed and granted respectively, so far as the rules of law and equity would permit, but so that the same should not vest absolutely in any person thereby made tenant in tail male by purchase unless such person should attain the age of twenty-one years, but on the death of such tenant in tail male by purchase under the age of twenty-one years should go, devolve, and remain in the same manner as if they had been freeholds of inheritance, and had been settled accordingly.

7. Ernest, third Marquis of Ailesbury, died on October 18, 1886. His grandson, Viscount Savernake, thereupon became fourth Marquis. He became bankrupt, and died without issue on April 10, 1894.

8. Lord Henry Brudenell Bruce thereupon became fifth Marquis, and he is now entitled for life to the said freehold estates, and the said heirlooms are vested in the defendants

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(the defendant, G. B. Lawrence, having been duly appointed a trustee of the resettlement of July 16, 1885, in the place of H. M. Walker, who died on December 27, 1891) upon the trusts declared by the said indenture of resettlement.

The Crown alleged that, under the circumstances before stated, legacy duty, under 36 Geo. 3, c. 52, on the chattels settled by the will of the second Marquis as heirlooms, became payable by the defendants either on the execution of the indenture of resettlement dated July 16, 1885, or on the death of the third Marquis in October, 1886.

The Commissioners of Inland Revenue were willing that interest on the legacy duty claimed should be deemed to run only from the death of the third Marquis, and they applied to the defendants for payment of the duty on that footing; but the defendants refused to pay the duty, and contended that no such duty was payable.

The information prayed that it might be declared that legacy duty under the will of the second Marquis of Ailesbury in respect of the chattels thereby bequeathed as heirlooms became payable by the defendants upon the execution of the indenture of July 16, 1885, or, if not then, upon the death of the third Marquis, or that it might be declared when such duty became payable, and that an account be directed.

Sir Robert Finlay, *A.-G.* (*Vaughan Hawkins* with him), for the Crown. Two questions arise—first, whether there is any liability to pay legacy duty at all; and, secondly, whether, if there is such a liability, the trustees under the resettlement of July 16, 1885, are the persons liable to pay the duty. Both questions turn upon the construction and effect of s. 14 of the Legacy Duty Act, 1796. (1) First, legacy duty clearly became

(1) By 36 Geo. 3, c. 52, s. 14, "No duty shall be paid on any articles of plate, furniture, or other things, not yielding any income, and given to or for the benefit of, or so as that the same be enjoyed by, different persons in succession, whilst the same shall be so enjoyed in kind only by any person or persons not having any power of selling or disposing thereof, so as to convert the same into money or other property yielding an income; but if the same shall be actually sold or disposed of, or shall come to any person or persons having power to sell or dispose thereof, or having an

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payable by somebody when, under the will of the second Marquis, Viscount Savernake's estate in tail male in expectancy would, but for the resettlement, have become an estate in possession. Sect. 14 does not permit the liability to pay legacy duty to be postponed for ever by the act of the person who is entitled in expectancy to an absolute interest in the chattels. Secondly, the trustees are the alienees of the chattels under the resettlement, and take them subject to the liability to pay legacy duty. The alienor has put the trustees in his place, and they are, therefore, persons to whom the property comes as an absolute interest. By the Act of George III. the duty is made a charge upon the property in the hands of the persons to whom it has come (ss. 6 and 12); in this case it is a charge upon the property in the hands of the assignees of the legacy, who are the defendants. *Bliss* v. *Putnam* (1); the Scottish case, *Nisbett's Trustees* v. *Learmonth* (2); and *Bryan* v. *Mansion* (3), are authorities which support the contention for the Crown that the defendants here are liable.

Danckwerts, K.C. (*Spencer Butler* with him), for the defendants. In construing Taxing Acts, the subject is not to be held liable unless the tax is imposed in clear and distinct terms; no equity can be involved to give the Crown anything more than is given by the clear words of the statute; if the matter remains in doubt, the subject is entitled to judgment: *Marquis of Chandos* v. *Commissioners of Inland Revenue* (4), judgment of Pollock C.B. (5); *Commissioners of Inland*

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absolute interest therein, then, and in each and every such case, the same duty shall be chargeable and paid thereon as if the same had originally been given absolutely, and with full power to sell or dispose thereof, and shall be chargeable upon and paid by the person or persons for whose benefit the same shall be sold, or who shall have power to sell and dispose thereof, or an absolute interest therein, and shall become the debt of such person or persons; but shall not be a charge upon any person or persons by reason of his, her, or their having assented to such bequest, as the person or persons having or taking the burthen of the execution of the will or testamentary instrument by which such bequest shall have been made."

(1) (1843) 7 Beav. 40.
(2) (1845) 8 D. 69.
(3) (1857) 3 Jur. (N.S.) 473.
(4) (1851) 6 Ex. 464.
(5) 6 Ex. at p. 479.

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Revenue v. *Angus* (1), judgment of Lord Esher M.R. (2); *Tennant* v. *Smith* (3), judgment of Lord Halsbury L.C. (4) Sect. 14 of the Act of George III. does not make the defendants here liable. They have never had an "absolute interest" in the chattels bequeathed by the will of the second Marquis within the meaning of that section. Their interest was limited under the terms of the settlement, and, as being merely trustees, they took no "absolute interest." The person expressly liable to legacy duty was the fourth Marquis, formerly Viscount Savernake. Only one person, or set of persons, can be made liable under s. 14. When the Legislature intends to impose duty in the way suggested for the Crown, it is imposed by express words, as in s. 42 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51). Under s. 52 of that Act, purchasers of successions to personal property are protected from duty; it is strange if that is not also the case with respect to purchasers of things bequeathed as legacies.

The general scheme of the Act of George III. is to make the duty a personal debt. Sect. 6 applies only "in all cases in which it is not hereby otherwise provided," and s. 14 is one of those cases. It does not make the duty a charge on the legacy, but makes it the personal debt of the person—in this case the fourth Marquis—who takes the benefit of the legacy. None of the cases cited for the Crown were decided on s. 14. The decision in *Bryan* v. *Mansion* (5) turned mainly on the particular facts of that case. The claim for duty was under s. 6, and depended upon whether or not the executor had in fact deducted the duty from the legacy. Sect. 6 has no application here. The defendants are not brought within the plain language of s. 14, and are, therefore, not liable for the duty claimed.

Sir Robert Finlay, *A.-G.*, was not called on to reply.

KENNEDY J. The question turns upon the effect to be given, under the circumstances of this case, to s. 14 of 36 Geo. 3,

(1) (1889) 23 Q. B. D. 579.
(2) 23 Q. B. D. at p. 589.
(3) [1892] A. C. 150.
(4) [1892] A. C. at p. 154.
(5) 3 Jur. (N.S.) 473.

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c. 52. It is, I think, clear that under that section, if there had not been the resettlement, the fourth Marquis would have become the absolute owner of these heirlooms. By reason of the resettlement he did not become so. He subsequently became bankrupt. The trustees of the resettlement, who are the defendants, did become possessed of the heirlooms upon the trusts of the resettlement. Are they, or are they not, liable to pay legacy duty to the Crown as claimed in the information? That question turns, it seems to me, upon whether or not, on the true construction of s. 14, the fact that the heirlooms never became the property of the fourth Marquis as absolute owner, but passed to the trustees under the resettlement, either prevents there having been any person who was the absolute owner (because, before the ownership could accrue to the fourth Marquis, the heirlooms came into the hands of the defendants as trustees under the resettlement, which again tied them up, as it were, in a special way), or prevents s. 14 having come into operation at all, because the resettlement intervened before the fourth Marquis could become the absolute owner. In my view our decision must be governed by the principle applied by Lord Cranworth in *Bryan* v. *Mansion*. (1) In that case there would have been an absolute owner, from whom legacy duty could have been claimed by the Crown, and he chose to part with the property by assigning it to others before he could become the absolute owner. Applying the principle of that decision here, I think the defendants ought to be treated, not as persons taking under the will, but as assignees from the fourth Marquis, and as assignees who are subject to the burden as well as the benefit of the assignment, that burden being the liability to pay legacy duty imposed upon the fourth Marquis by the terms of s. 14. I am of opinion, therefore, that the Crown is entitled to succeed on this information.

PHILLIMORE J. I am of the same opinion. Two points are raised—one easy to decide, the other presenting more difficulty. The second Marquis of Ailesbury by his will bequeathed specific chattels upon terms corresponding as nearly

(1) 3 Jur. (N.S.) 473.

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as possible to the limitations of certain estates under two settlements then existing. Under the will and those settlements, and in the events which happened, the fourth Marquis would, if nothing were done to defeat his interest, become absolutely entitled to the chattels by reason of his being tenant in tail male in possession of the estates. Before those estates, and before those chattels, came into possession he executed a new settlement tying up the estates and chattels, and reducing his own individual interest in them—that was, converting his estate in tail male into an estate for life, and limiting various estates for life in remainder over. He then became bankrupt, and then died. The result has been that hitherto the Crown has got no legacy duty in respect of his coming into possession of those chattels. Sect. 14 of 36 Geo. 3, c. 52, prevents any duty attaching whilst the chattels are subject to a life interest. It is said, in the first place, on behalf of the defendants, that there is no liability to legacy duty at all, because the effect of the resettlement made before the chattels vested in possession was to prevent there ever being an absolute interest in them. Now, this kind of resettlement of chattels which are in the nature of heirlooms has existed for a great many years, and I should say that since the Act of George III. was passed there must have been such resettlements every year during the time it has been in existence. That being so, it is certainly strange to learn that the Crown during the whole of that period has been deprived of all duty in respect of chattels subject to those resettlements, either because it has not asked for the duty, or has not sought to amend the law. However that may be, I myself have no doubt that it does not lie in the mouth of the fourth Marquis, or in the mouths of those claiming title under him, to say that the property in question has not vested in absolute possession. He would have had an absolute interest in it if he had not divested himself of that interest before it came into possession, and passed it on to others. I am of opinion that he cannot defeat the right of the Crown to legacy duty by so doing.

Then comes the more difficult question, whether the defendants are liable. One cannot help seeing that in this case

the Crown might be defrauded of a just claim if we were to hold that the defendants were not liable. The fourth Marquis became bankrupt, but before the bankruptcy he had passed his interest in these valuable chattels to others. If he had kept the chattels non constat that he ever would have been bankrupt; still less is it clear that his assets would not have been sufficient to satisfy the preferential claim of the Crown for legacy duty. On that ground I confess I approach the contention made for the defendants with some hesitation. Further, I think that contention, although at one time there appeared to be a great deal to say for it, founded, as it was, upon the strict words of the statute, now disappears before the three decisions cited to us, and especially before Lord Cranworth's decision in *Bryan* v. *Mansion*. (1) Probably the true view of s. 14 is that the persons who, at the moment when the interest actually vests in possession, have the right to call for the property are the persons then "having the absolute interest therein" within the meaning of the section, and are, therefore, liable for the duty. Either upon that ground, or upon the ground that the statute must be construed as extending to persons into whose hands the property actually comes, for which we have the sanction of Lord Cranworth, I am of opinion that the Crown is entitled to succeed.

Judgment for the Crown.

Solicitor for the Crown: *The Solicitor of Inland Revenue.*
Solicitors for defendants: *Nicholl, Manisty & Co.*

(1) 3 Jur. (N.S.) 473.

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May 9, 10.

In re THE SURREY COUNTY CRICKET CLUB.

Revenue—Corporation Duty—Real Property — Principle of Assessment — "Annual Value, Income, or Profits"—Customs and Inland Revenue Act, 1885 (48 & 49 *Vict. c.* 51), *s.* 11.

Sect. 11 of the Customs and Inland Revenue Act, 1885, imposes on bodies corporate or unincorporate, in respect of all real and personal property belonging to them, a duty payable yearly at the rate of 5 per cent. upon "the annual value, income, or profits of such property after deducting therefrom all necessary outgoings, including the receiver's remuneration, and costs, charges and expenses properly incurred in the management of such property."

The Surrey County Cricket Club, an unincorporated body of persons, were possessed of real and personal property, the real property consisting of a building and land in the metropolis held under a lease for years and used by them for the purposes of a cricket club. Their receipts included large sums in respect of gate-money and other payments received from persons admitted to view the cricket matches played on the ground. The club was carried on at a profit:—

Held, that the gate-money and other payments received from the public were not "annual value, income, or profits of the property" within the meaning of s. 11; that the annual value of the real property should be arrived at in the same way as upon an assessment of annual value made for the purposes of the property tax under Sched. A of the Income Tax Act (16 & 17 Vict. c. 34), and that the club were entitled to include the estimated cost of repairs as a permissible deduction from that annual value.

PETITION, by way of appeal against an assessment of duty under Part II. of the Customs and Inland Revenue Act, 1885 (1),

(1) 48 & 49 Vict. c. 51, s. 11: "Whereas certain property, by reason of the same belonging to or being vested in bodies corporate or unincorporate, escapes liability to probate, legacy, or succession duties, and it is expedient to impose a duty thereon by way of compensation to the revenue: Be it therefore enacted, that there shall be levied and paid to Her Majesty in respect of all real and personal property which shall have belonged to or been vested in any body corporate or unincorporate during the yearly period ending on the fifth day of April, 1885, or during any subsequent yearly period ending on the same day in any year, a duty at the rate of five pounds per centum upon the annual value, income, or profits of such property accrued to such body corporate or unincorporate

made by the Commissioners of Inland Revenue on property of the Surrey County Cricket Club.

The petition was presented by the secretary of the club for and on behalf of the club. It stated the following facts, which were admitted by the Commissioners of Inland Revenue:—

The Surrey County Cricket Club is an unincorporated body governed by rules.

The club is lessee of the ground known as Kennington Oval at a rent of 750*l.* per annum, the lessee paying all rents and taxes. Certain parts of the property comprised in the lease are underlet by the club, and the rents received on these underlettings are stated in the revenue account set forth in the petition under the head of "rents received." The rest of the ground is in hand and in possession of the club. The club has also certain investments of stocks, the income of which appears in the revenue account.

The only other receipts of the club are, first, the subscriptions and entrance-fees paid by members of the club, and, secondly, gate-moneys and other payments received from the public for viewing the cricket and other matches played from time to time on the ground. Except as hereinbefore stated the club has no property real or personal.

[The revenue account of the club for the year ending December 31, 1898, was then set out. It shewed a surplus balance of receipts over expenses of 3735*l.* 3*s.* 7*d.*]

Having been furnished with that revenue account, the Commissioners of Inland Revenue assessed the duty payable by the club under Part II. of the Customs and Inland Revenue Act, 1885, in respect of property belonging to the club during the year ending April 5, 1900, at 102*l.* 18*s.* 6*d.*, being 5 per cent. on 2058*l.* 9*s.* 1*d.*; and by notice of charge they demanded payment of that sum of 102*l.* 18*s.* 6*d.* from the club.

With the notice of charge the Commissioners forwarded to

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in the same yearly period, after deducting therefrom all necessary outgoings, including the receiver's remuneration, and costs, charges, and expenses properly incurred in the management of such property."

[Then follows an exemption in respect of certain specified bodies.]

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the petitioner an account in detail how their assessment was arrived at, a summary of which is as follows:—

COMMISSIONERS' ACCOUNT.

CORPORATION DUTY, 1899–1900. SURREY COUNTY CRICKET CLUB.

Receipts.

	£	s.	d.	£	s.	d.
Rent of the Surrey Tavern				300	0	0
Rents received on other underlettings				230	10	0
Stands				1,129	14	6
Gate-money				6,325	18	0
				7,986	2	6
Interest on investments	151	18	2	151	18	2
Gross assessable income				£8,138	0	8

Expenditure.

	£	s.	d.
Match expenses, as per account for year ended December 31, 1898	3,650	4	1
General expenses:— Secretary's salary, clerks, office wages, cricket instructor's salary, law costs, &c., &c.	1,348	5	5
Ground expenses, as per account for year ended December 31, 1898	3,811	18	5
	£8,810	7	11

Total receipts (including members' subscriptions), £14,316 17*s.* 8*d.*

Proportion of assessable income to total receipts—say four-sevenths.

Therefore, four-sevenths of admissible deductions to be allowed.

Deductions admissible, viz.:—	£	s.	d.
Four-sevenths of £8,810 7*s.* 11*d.*	5,034	10	3
Ground-rent	750	0	0
Insurance	4	3	6
Rates	257	10	4
House rent—61, The Oval	33	6	8
Total deductions	£6,079	10	9

	£	s.	d.
Gross assessable income	8,138	0	8
Less deductions	6,079	10	9
Net amount assessed	£2,058	9	11

Duty at 5 per cent. £102 18*s.* 6*d.*

An account shewing the principle upon which the club contended they ought to be assessed was prepared by them and submitted to the Court.

The following is a summary of that account:—

CLUB'S ACCOUNT.

CORPORATION DUTY. ASSESSMENT, 1899–1900, BASED UPON THE PUBLISHED ACCOUNTS TO DECEMBER 31, 1898.

	£	s.	d.	£	s.	d.
Assessment, 1898, Sched. A:—						
Building (gross)				1,000	0	0
Land „				400	0	0
Rent received (tavern)				300	0	0
Income received from investments in stocks .				151	18	2
				£1,851	18	2
Deductions:—						
Ground-rent	750	0	0			
Interest on mortgage of lease .	65	7	5			
Repairs—10 per cent. on £1,400 (the gross annual values of the building and land) . .	140	0	0			
				955	7	5
				£896	10	9

5 per cent. on £896 10*s.* 9*d.* is £44 16*s.* 4*d.*

The petitioner duly gave notice of his intention to appeal against the Commissioners' assessment. The duty has not been paid.

The petition prayed (inter alia):—

That it might be declared that the assessment of duty on the club ought to be made only on the net annual value of the property of the club in hand, and on the net income of property actually let and of investments belonging to the club:

And that the gate-money and other payments received at the Oval are not annual value, income, or profits of real or personal property belonging to the club within the meaning of the Customs and Inland Revenue Act, 1885:

And that it might be ascertained and declared what is the

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amount in respect of which the club is properly chargeable with duty under that Act, and for that purpose that all necessary inquiries and directions might be made and given, and accounts taken.

A. T. Lawrence, K.C., and *Vaughan Hawkins*, for the petitioner. The club should be taxed on the basis of the account which they have tendered. "Annual value" in s. 11 is intended to deal with the case of land of which the owner is in possession. The term, as used in Taxing and Rating Acts, has a well-understood meaning, and the club have properly taken as the annual value of their real property in hand their assessment under Sched. A of the Income Tax Act (16 & 17 Vict. c. 34). The Commissioners of Inland Revenue themselves at one time seem to have thought that was the proper way of arriving at the annual value, because in the forms of return first issued by them in respect of assessments under s. 11 they put an assessment under Sched. A. The phrase "annual value" is taken from the Succession Duty Acts, and means the same thing as in those Acts. "Income" in s. 11, so far as it applies to real property, refers to the income derived from land which is not in possession, and the club have, in their account, rightly included as a subject of taxation the income they derive from letting the tavern. The term "profits" refers to incidental and impersonal profits resulting from the ownership of land, such as manorial profits. The distinction between that class of profits and trade profits was pointed out by Pollock B. in *Duke of Norfolk* v. *Lamarque*. (1) The deductions claimed in the club's account are also proper. No question arises as to the income of their personal property. The account presented by the Commissioners of Inland Revenue is based upon a misconception of the true construction of s. 11. They have included in the receipts of the club the money received from persons who have seats in the stands to view the cricket matches, and "gate-money." Those sums are the gross profits of carrying on the undertaking of a cricket club, and are analogous to trade profits. They are not "income" or

(1) (1890) 24 Q. B. D. 485.

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"profits" within the meaning of s. 11, which imposes the tax upon the annual value, income, or profits "of property," not upon the income derived from the exertions, in carrying on an undertaking or business which may result in a gain or in a loss, of those who are in occupation of the property. The tax is imposed, as s. 11 recites, because bodies corporate and unincorporate escape the death duties; the section applies only to realized property, and it may be conceded that the tax would be payable in respect of income derived from invested profits. The deductions allowed by the Commissioners in their account are not sanctioned by s. 11. They have not included "members' subscriptions" as being directly subject to the tax, but they add the amount of the members' subscriptions to the other receipts of the club, and take the proportion which they say the assessable income bears to the total receipts, namely, four-sevenths, and deduct that four-sevenths from the total expenditure. That mode of arriving at the proper deductions to be made under s. 11 is purely arbitrary; the section enumerates specifically the deductions which are to be made.

Sir Edward Carson, S.-G., and *S. A. T. Rowlatt*, for the Crown. The account presented by the Commissioners of Inland Revenue is substantially in compliance with s. 11 of the Customs and Inland Revenue Act, 1885. The course taken by the Commissioners in this and similar cases is to take the annual value of property in hand where no income or profits accrue from the occupation of it; but to tax the income and profits where they do accrue. Sect. 11 must be construed upon its own language; it does not refer to other Acts of Parliament imposing death duties, and you have to see, not what the succession, or probate, or legacy duty would be, but what s. 11 itself says is to be paid by corporate and unincorporate bodies as a compensation to the revenue for the loss of those duties. The section deals with all property, whether real or personal. It does not say, as it easily might have said had that been its intention, that the "annual value" of real property in hand was to be arrived at by taking a Sched. A assessment. "Income" covers receipts from property not in hand, such as the rents received by the club here. Under the

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term "profits" s. 11 intends to include profit earned by the property itself which is in hand. The "Oval" cricket ground here is leased to the club as a cricket ground, and some proportion of the receipts from the stands and the gate-money must be attributed to the earning power of the property so leased and used as a cricket ground. It is, no doubt, difficult to separate the profits attributable to the use of the land as a cricket ground from the profits attributable to the exertions of those who arrange the matches and engage the players, which may be called the "business profits," but the Commissioners have arrived at a result which, although perhaps not scientifically accurate, is substantially a fair division as between the Crown and the subject. They do not claim to tax the business profits; if the revenue account furnished by the club be compared with the account prepared from it and presented by the Commissioners, it will be seen that a sum of about 1700*l.* representing business profits is not brought into their account at all. As to the deductions in the Commissioners' account, although it is admitted, for the purposes of this case, that the sum representing members' subscriptions is not directly taxable under s. 11, it is right, in order to arrive at the proper deduction, to add that sum to the gross assessable income, because a proportion of the expenses to be deducted are incurred in respect of obtaining the members' subscriptions. The plan adopted by the Commissioners of taking the proportion—four-sevenths—which the gross assessable income bears to the total receipts, and deducting four-sevenths of the total expenditure, although it may be said to be purely arbitrary, is, nevertheless, a fair way of arriving at the proper deduction to be made in respect of the costs, charges, and expenses properly incurred in the management of the property.

A. T. Lawrence, K.C., in replying, was asked by the Court to deal only with the question whether the deduction of 10 per cent. for repairs appearing in the club's account could properly be made. The deduction of 10 per cent. for repairs is right. By s. 45 of the Metropolis Valuation Act, 1869 (32 & 33 Vict. c. 67), the valuation list for the time being in force is to be conclusive for the purpose of any tax assessed

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in pursuance of the Income Tax Act, and, in construing the Income Tax Acts with respect to Scheds. A and B, annual value is to be deemed to be the gross value stated in such list. By s. 11 of the Act of 1885 the annual value is to be taken "after deducting therefrom" the necessary outgoings, &c. You are, therefore, to take the annual value under Sched. A, which is the gross value without any deduction for repairs, and deduct therefrom the necessary outgoings, costs, charges, and expenses; but the annual value which you take is the same in both Acts. Both the annual value and the deductions must be arrived at upon an estimate, because the assessment is made and the tax paid before the year of taxation has run out. The words "properly incurred" in s. 11 cannot, therefore, mean "which have actually been incurred when the assessment is made." [He referred to *Dobbs* v. *Grand Junction Waterworks Co.* (1)]

KENNEDY J. My opinion is, on the whole, in favour of the petitioner in this case. The matter is not free from doubt, because it would have been so easy to say in the Act itself that, with regard to real property, duty was to be paid at the rate of 5 per cent. upon the annual value according to Sched. A. That not having been said, one is inclined to credit the Legislature with having had, for good reasons perhaps, some different intention. It is contended here for the Crown that what ought to be ascertained for the purpose of taxation is the annual value of the Surrey County Cricket Club's property having regard to what is actually earned from that property, as the Crown allege, during the year. It is, in my view, important in dealing with matters of taxation and rating, in order to maintain a principle which shall be of general application between the Crown and the subject, to adopt a rule which shall in its working come as nearly as you can get to the intention of the Legislature in taxing the person who has to pay; and the opinion I have formed is arrived at because I think that the principle upon which the club ask that they may be taxed under s. 11 of the Customs and Inland Revenue Act, 1885,

(1) (1883) 9 App. Cas. 49.

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comes much nearer to effecting the purposes of that section, and is much more like what I conceive to be the principle of the Act, than the scheme presented by the Crown. As regards their real property, the club take as the basis of taxation the property tax assessment under Sched. A of the Income Tax Acts. Upon that footing they put the gross estimated value of the building at 1000*l.* and of the land at 400*l.*, and they add the rent—300*l.*—which they receive in respect of the tavern. Then they add the income received from their personal property as set out in their scheme. They say that by the later words of the section they are entitled to a deduction from what may be called the basis to be found in Sched. A, that deduction being in respect of necessary outgoings, including the receiver's remuneration, and costs, charges, and expenses properly incurred in the management of the property. I thought at one time that in making that kind of claim of deduction they were imperilling the view they wished to be taken with respect to the applicability of Sched. A as a basis of taxation; but the argument addressed to us by their counsel has satisfied me that there is nothing inconsistent in taking the words "properly incurred in the management of such property" as applying to costs, charges, and expenses which either have been or may be properly incurred in the management of the property. I think there is good reason for taking that view because, where property is actually in the possession of the person taxed, those costs, charges, and expenses must be treated, in a sense, as matters of estimate—just as, in trying to arrive at what the hypothetical tenant would give, you treat as a matter of estimate the calculation for the purposes of taxation under Sched. A. It is said by counsel for the Crown that, in order to get at the annual value of the real property, you must look at the use to which that property is actually put by the person sought to be taxed under s. 11; and that the property occupied by the club is used for earning money—the gate-money and so forth—which goes to maintain the club. It is true that the land here is used for a business purpose or transaction: it is used for the purposes of a club for social enjoyment, and also for earning gate-money which goes to maintain the club; expenses are

incurred in relation to what may be called the business matters of getting up matches, making payments to the players, and the like, and a large sum of money representing members' subscriptions is brought into the funds received by the club. Under those circumstances the difficulty I feel in acceding to the contention for the Crown is this: I do not see how the annual value of the property, or, if you like, the income or profits of the property, can be separated from the annual value, income, or profits of the undertaking carried on on the property —in other words, from the management of the property as it is used with such an item or element as the members' subscriptions, which the Crown admit, for the purposes of this case, ought not to be directly taxed. It must be remembered that the club is paying income tax under Sched. D in the usual way. What they are now asked to pay is a duty imposed by Parliament because they escape liability to probate, legacy, or succession duty. It would, therefore, be unfair, if they have been taxed under Sched. D in respect of income, to tax them in respect of that income twice over—once under Sched. D, and again under s. 11 of the Customs and Inland Revenue Act, 1885. Further, upon the face of the account presented by the Commissioners, upon which they ask us to act, there arises this question of members' subscriptions. The Solicitor-General frankly admitted that the question is dealt with in the account upon no principle or rule which could be generally applied. The appropriation of a portion of the expenses to a proportion of the subscriptions in the way stated in the account is, it seems to me, a mode of arriving at the proper deduction to be made which could only be contended for if one was seeking to find out the meaning of "annual value" without any guide from other Acts of Parliament. That, again, to my mind, illustrates the unwisdom of applying s. 11 so as to mix the business takings, profits, and expenses with the annual value, or income and profits, of the land. My reading of s. 11 is this: The tax, as to real property, is intended to be levied upon the annual value. The term "annual value" has already got an understood meaning as used in Revenue and Taxing Acts in respect of real property, and I think that the

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term, as used in s. 11, ought to be taken substantially to mean annual value as assessed under Sched. A. But the section applies to personal as well as real property, and the tax is imposed in respect of something which annually accrues from personal property to the body of persons sought to be taxed. If they get by its use a regular or periodic return, that would be covered by the term "income," which is intended to relate to personal property as "annual value" relates to real property. But there may be gains from personal property which cannot properly be called income, and the more general word "profits" covers them. It is intended to cover incidental and non-periodic advantages of a pecuniary kind which may come from personal property. I am of opinion, therefore, that substantially in principle, as nearly as we can arrive at it, the scheme which is put forward by the club is right and should be accepted. The annual value of the real property should be charged in accordance with an assessment under Sched. A, subject to a reduction of some kind under the words at the close of s. 11. They have deducted here 10 per cent., taking, as I understand, the deduction allowed by the Succession Duty Acts. Primâ facie, that seems fair, though the deduction may be reconsidered if the Commissioners think it too great. The income of the personal property should be charged as it is in the club's scheme. I am, therefore, of opinion that the petitioner is entitled to succeed.

PHILLIMORE J. I am of the same opinion. Assuming that the figures given by the club are correct, and that the Crown does not claim any special rate of deduction for repairs in this case, I think that the scheme tendered by the club is right, and their only taxable property is that which, at the rate of 5 per cent., works out at 44*l.* 16*s.* 4*d.* This is a tax upon corporate and unincorporate bodies which is substituted for, although, of course, not the same as, the death duties. It is a tax or toll which the body pays for the privilege of living, and just as a living man, if he is the owner of land, pays under Sched. A; if he is the occupier of land, under Sched. B; if he is a receiver of income from stocks, under Sched. C; if he carries on a

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business, under Sched. D; and, if he fulfils all those conditions, pays under all four schedules; so the corporate or unincorporate body pays under Scheds. A, B, C, and D if it has income derivable from those sources. Then, in addition to the income tax which they pay as a living person pays it, there arises this 5 per cent. imposed by the Customs and Inland Revenue Act, 1885. Now, I can see no logical halting-place for the contention put forward for the Commissioners short of saying that a portion of the tax which the club pays under Sched. D must be levied over again upon them as corporation duty—i.e., that they have to pay income tax under Sched. D, and that then they are in addition to pay 5 per cent. on their income derived from the occupation of land. That must be wrong, and I understood the Solicitor-General so to admit; but that result must, I think, logically follow from his argument. The contention for the club is that in respect of their income from stocks a Sched. C assessment must be taken, and in respect of their income from land a Sched. B assessment. As to "annual value," I entirely agree with my brother Kennedy. The term must, I think, be taken to have been intended to mean the same thing as in other Taxing Acts, and it is reasonable to suppose, as the Commissioners themselves obviously supposed when they first issued the forms of return, that the "annual value" is that which is ascertained for the purpose of assessing the income tax under Sched. A. The rules for ascertaining it are clear and perfectly easy of application in the present case, and a Sched. A assessment has been arrived at. In respect of the club's income from stocks, there is no question that they must take their Sched. C assessment, or an equivalent. But the Act of Parliament goes further—it allows the corporate or unincorporate body certain privileges. First, as they cannot act except by an agent, it allows them to deduct the salary of the receiver; and, secondly, it allows them to make certain further deductions from the annual value. Now in the metropolis, by the operation of the Metropolis Valuation Act, 1869, the annual value is the gross annual value. The only deductions the club seek to make here are ground-rent, which is unquestionable, and 10 per cent. for repairs and insurance;

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and, assuming that the Commissioners do not complain of that percentage, it seems to me that those deductions are right.

There should be, in my opinion, a declaration that, subject to any question as to particular figures, the assessment ought to be on the basis of the account tendered by the club.

Declaration in favour of the petitioner accordingly.

Solicitors for petitioner: *Wilsons, Bristows & Carpmael.*
Solicitor for the Crown: *The Solicitor of Inland Revenue.*

W. A.

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June 7.

[IN THE COURT OF APPEAL.]

PRICE AND ANOTHER *v.* MARITIME INSURANCE COMPANY, LIMITED.

Insurance (Marine)—Insurance on Advances for Disbursements—"Warranted free of all Average"—Loss of Ship by Perils of Sea—Obligation of Master conditional on Arrival of Ship—Pledge of Freight not conditional—Part of Freight Payable—Partial Loss.

The captain of an Italian ship, in consideration of advances made by bankers for ship's disbursements at the port of loading, signed and indorsed to the bankers a document in the following terms: "Ten days after arrival at port of destination of the steel barque *Cinque*, of which I am master, now lying at Pensacola, Fla., and ready to sail for Southampton, I promise to pay to the order of myself the sum of 760*l.* 12*s.* 9*d.*, British sterling, in approved bankers' demand bills on London, value received for necessary disbursements of my vessel at this port, for the payment of which I hereby pledge my vessel and freight; and my consignees at the port of destination are hereby directed to pay the amount of this obligation from the first amount of freight received for account of my said vessel." The bankers effected an insurance of the advances so made against perils of the sea by a policy warranted free of all average. The ship never arrived at the port of destination, but became a constructive total loss on the voyage. Part, however, of the cargo was salved, upon which by Italian law distance freight became payable. In an action by the assured upon the policy as for a total loss:—

Held, that the pledge of freight took effect, although the ship did not arrive at the port of destination, and there was therefore not a total loss of the subject-matter of insurance, and consequently that the action on the policy was not maintainable.

APPEAL from the judgment of Bigham J. in an action tried before him without a jury.

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The action was brought to recover as for a total loss upon a policy of insurance against sea perils "at and from Pensacola to Southampton," the subject-matter of insurance being described as "advances, valued 775*l.*, in the ship or vessel *Cinque*." The policy was "warranted free of all average."

The master of an Italian ship, called the *Cinque*, loading at Pensacola for Southampton, received from the Citizens' National Bank of Pensacola advances for the payment of ship's disbursements, in respect of which he gave the bank a document in the following terms: "Ten days after arrival at port of destination of the steel barque called *Cinque*, of which I am the master, now lying at Pensacola, Fla., loaded with P. P. sawn timber and lumber, and ready to sail for Southampton, I promise to pay to the order of myself the sum of 760*l.* 12*s.* 9*d.* British sterling, in approved bankers' demand bills on London, value received for necessary disbursements of my vessel at this port; for the payment of which I hereby pledge my vessel and freight; and my consignees at the port of destination are hereby directed to pay the amount of this obligation from the first amount of freight received for account of my said vessel. Any other draft or obligation by me drawn at this port on said freight to be secondary to this. Signed in duplicate, one being accomplished, the others to stand void. Tommaso Rittori, master of the steel barque *Cinque*." This document was indorsed in blank by the master, and indorsed by the bank to the plaintiffs for collection. The plaintiffs effected with the defendants the policy of insurance, upon which the action was brought, on behalf of the bank. The *Cinque* sailed from Pensacola, but on her voyage met with such bad weather that she was compelled to put in for refuge at San Miguel in the Azores, where she was driven ashore by a storm, and became a constructive total loss. The underwriters on her cargo paid as on a total loss, and, a portion of the cargo being salved, sold the same to purchasers, who paid to the master the sum of 790*l.*, as distance freight due according to Italian law, by which the contract of affreightment was governed. The

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plaintiffs, who had not received any of the freight so paid, then brought the action upon the policy. The learned judge gave judgment for the defendants.

Carver, K.C., and *Scrutton, K.C.*, for the plaintiffs. This is an insurance on advances made for ship's disbursements, and the question is whether those advances were totally lost by perils insured against. It is contended that they were, because they were made on the terms of the document signed by the captain, and were only payable by those terms in the event of the ship's arriving at her port of destination, which she never did. The pledge of the ship and freight was only as security for, and commensurate with, the captain's obligation, which was conditional upon the ship's arrival. It has been held that an obligation such as that constituted by the document signed by the captain is in the nature of a bottomry bond on the ship: see *The Haabet* (1); *The Dora Forster*. (2) The clause of the document, which provides for payment of the freight in discharge of the obligation by the consignees at the port of destination, shews that the intention was that the charge on freight should be only conditional on the arrival of the ship, like the obligation.

[They also cited *The Karnak* (3); *The Elpis* (4); *Lucena* v. *Craufurd*. (5)]

Joseph Walton, K.C., and *J. A. Hamilton, K.C.*, for the defendants. The whole question here is whether there was a total loss of the subject-matter of the insurance. It is submitted that, according to the true construction of the document signed by the captain, the pledge of freight is not conditional upon the arrival of the ship at her port of destination. That is not the natural construction, and there is no reason why the makers of the advances should be willing so to restrict their security. The bankers could only insure themselves against the loss of the ship in respect of the advances, for it is only

(1) [1899] P. 295.
(2) [1900] P. 241.
(3) (1868) L. R. 2 A. & E. 289.
(4) (1872) L. R. 4 A. & E. 1.
(5) (1802–8) 3 B. & P. 75; 6 R. R. 623.

because they have made the advances that they can insure at all. The whole interest of the assured was insured under the policy. What was that interest? Under the document signed by the captain they had as security for their advances his personal liability, which may be admitted to have been conditional on the arrival of the ship at her port of destination, the liability of the owners, assuming that they were personally liable for the advances, and the charge on the ship and the freight. Then what have the assured lost by the loss of the ship? It may be admitted that they have lost the personal liability of the master, and that of the owners, if any, and also the security of the ship, but they have not totally lost the security of the freight, for a portion of the freight was payable by virtue of the Italian law as such. That being so, it cannot be said in any way that there was a total loss. Why should the intention be that the security by the pledge of the ship and freight should be restricted to the conditional obligation of the captain? It is not reasonable to suppose that bankers making advances to the captain of a ship would so intend. The clause directing payment of freight by consignees at the port of destination in discharge of the obligation does not, when fairly looked at, indicate any intention that the pledge of freight should be conditional. It is very natural that such a direction should be inserted in view of the fact that the consignees would be at that port.

Carver, K.C., in reply. It is submitted that bankers making advances in a case like this would never contemplate as a security for their advances distance freight payable by foreign law at a foreign port, where they might have no agents, and no means of finding out whether freight was payable or of collecting it. They would contemplate the freight payable at the port of destination, and cover themselves against the risk of that never becoming payable by insurance. It would be most inconvenient for them, if, because some amount of freight, which might be very small, had become payable at a foreign port, they should have to look to that as security, although the ship was prevented by perils of the sea from arriving at her port of destination.

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A. L. SMITH M.R. This is an appeal from the judgment of Bigham J. in an action upon a policy of marine insurance, in which the defendants are sued as for a total loss in the following circumstances. Certain bankers at Pensacola made advances for ship's disbursements to the captain of an Italian ship loading there for a voyage to Southampton; and, in order to secure repayment of the advances so made, the document upon which the case turns was signed by the captain. The bankers, who had made the advances, for the purpose of covering themselves, effected with the defendants the policy sued upon, which is warranted free of all average. The question is whether, having regard to the terms of the document signed by the captain, there was a total loss of the subject-matter of insurance. The terms of that document are, so far as material, as follows. First of all the captain promises, ten days after arrival of the ship at the port of destination, to pay the sum of 760*l.* 12*s.* 9*d.* by approved bankers' demand bills on London, value received for necessary disbursements of the vessel, "for the payment of which" he then pledges the vessel and freight. I do not think that upon the true construction of the document this pledge of the freight is conditional on the arrival of the ship at the port of destination. The document then proceeds to say that the consignees at the port of destination are thereby directed to pay the amount of the obligation from the first amount of freight received for account of the vessel. I do not think that this last provision has the effect attributed to it by the plaintiffs' counsel. The consignees would in the ordinary course be at the port of destination, and therefore naturally this provision would be inserted in reference to them. On the terms of this document the advances were made. Now what security for their advances did the bankers obtain under that document? In the first place they had the personal obligation of the captain, which no doubt was conditional upon the arrival of the ship in this country; further they may have had the liability of the owners; and lastly they had a charge upon the vessel and freight. What happened subsequently was this. The ship got as far as the Azores on her voyage, and then became a constructive total loss, and, had it not been that the

Italian law applied, there would have been a total loss of the freight; but by reason of the provisions of that law distance freight was earned by the ship, and paid, to the amount of 790*l*. Under these circumstances, can it be said that there was a total loss of the subject-matter of insurance? The liability of the master and the charge on the ship have been no doubt lost, but it cannot be said that the charge on the freight was totally lost. Consequently there was at the most only a partial loss, and, as the insurance was only against total loss, the action must fail. For these reasons I think the appeal must be dismissed.

VAUGHAN WILLIAMS L.J. I agree. I do not propose to say anything as to the extent of the security which the bankers obtained under the document signed by the captain or the effect on that security of the constructive total loss of the ship, except so far as concerns the charge on freight. I wish, in dealing with the case, to limit myself entirely to the question with regard to the nature of the charge on freight. In my judgment that charge was not a conditional charge, to arise only on the arrival of the ship at the port of destination, but a charge on freight wherever it might accrue. That being so, I have to ask myself the further question, What was that charge intended to secure? I think that the answer is that it was intended to secure the money advanced by the bank, namely, 760*l*. 12*s*. 9*d*. I do not think that the security was limited to the obligation taken by the captain upon himself, which was only to pay on the arrival of the ship at her port of destination. If this is the nature of the charge on the freight, the answer to the principal question in the case is very simple. Was there or was there not a total loss of the security which the bankers obtained under the document signed by the captain? The answer must in my judgment be that there was not, because there was clearly I think an absolute charge on the freight, and part of the freight, namely, 790*l*., was not lost, but was received at the port of refuge. The only expression in the document signed by the captain which could be pointed to as limiting the charge upon the freight was the direction to consignees at the port of

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destination to pay it directly in discharge of the obligation. But that is, in my opinion, only so expressed because in the ordinary course of business the consignees would probably be at the port of destination.

STIRLING L.J. This case appears to me really to resolve itself into a short question of construction. Certain bankers made advances for ship's disbursements upon the terms of a document signed by the captain of the ship. That document begins by a promise by him to pay ten days after the arrival of the ship at her port of destination the amount of the advances. It appears to be admitted on all hands that that promise is conditional on the arrival of the ship. It is followed by a charge on the vessel and freight, and the question really is whether that charge is, like the promise, conditional or an absolute charge to take effect at once. The words of the document are: "for the payment of which I pledge my vessel and freight." Strictly read, that expression would mean, I think, simply "for the payment of which sum, i.e., 760*l.* 12*s.* 9*d.*, I pledge my vessel and freight." It is suggested that it means, "for which conditional payment," or "for payment of which, subject to the before-mentioned conditions, I pledge my vessel and freight." But no words importing any condition are attached to the pledge. I do not see any reason why such words should be imported to vary the natural meaning of the word "which," i.e., the sum of 760*l.* 12*s.* 9*d.* One sees some reason why the obligation of the captain incurred in connection with the ship should be made conditional on the arrival of the ship at the port of destination, but there seems to me to be no reason why the charge on the freight should be made conditional also. It was urged by the counsel for the plaintiffs that it would be very inconvenient if bankers making advances as in this case, and covering themselves afterwards by insurance, should not be entitled to recover, because a small amount of freight became payable, notwithstanding the non-arrival of the ship; but the answer to that suggestion seems to be that they could insure, not against total loss only, but against partial loss also. It was said also that the provision in the document

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signed by the captain, directing the consignees at the port of destination to pay the amount of the obligation out of freight, indicates an intention on the part of the framers of the document that the pledge of the freight should only take effect in the event of the vessel arriving at the port of destination. I think that so to construe the document would be carrying the effect of that provision too far. The provision refers to consignees at the port of destination merely, I think, because the consignees would naturally be at the port of destination.

Appeal dismissed.

Solicitors for plaintiffs: *Thomas Cooper & Co.*

Solicitors for defendants: *Field, Roscoe & Co., for Batesons, Warr & Wimshurst, Liverpool.*

E. L.

[IN THE COURT OF APPEAL.]

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April 23, 24, 25; *June* 21.

DRIEFONTEIN CONSOLIDATED GOLD MINES, LIMITED *v.* JANSON.

Insurance (Marine)—Capture—Property of Alien Enemy—Loss before Commencement of War—Intention to wage War—Seizure by Enemy's Government of Property of its own Subject—Validity of Insurance.

Gold, the property of a mining company, which was incorporated under the laws of the Transvaal, but whose shareholders were almost all resident in Europe and were not subjects of the Government of the Transvaal, was insured with British underwriters against capture (amongst other risks) during transit from mines in the Transvaal to the United Kingdom. During the transit the gold was seized by the Government of the Transvaal. At the time of the seizure war between this country and the Transvaal was imminent, but the British Government did not treat the seizure of the gold as a hostile act, and war did not commence for some days afterwards.

An action having been brought by the company to recover for the loss of the gold on the policy of insurance, the underwriters defended it on the ground that the plaintiff company was a subject of the Government of the Transvaal, and the gold was seized by that Government for the purposes of expected hostilities with this country, and that the insurance of the plaintiffs' property against risk of such a seizure was against public policy. It

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was agreed between the parties that the case should be dealt with as if the war were ended:—

Held, by the Court (A. L. Smith M.R. and Romer L.J., Vaughan Williams L.J. dissenting), that the insurance of the plaintiffs' property against such a seizure as had taken place was not contrary to public policy, and that the action was therefore maintainable.

APPEAL from the judgment of Mathew J. in an action tried before him without a jury. (1)

The action was upon a policy of insurance on gold, the property of the plaintiffs, during transit from mines in the Transvaal to the United Kingdom. The insurance was against the usual risks, including "arrests of all kings, princes, and peoples." The plaintiff company was incorporated and registered as a company under the law of the South African Republic. It had, however, a London office and a London committee of management, and the shareholders were almost all resident in Europe, and were not subjects of the Government of the Transvaal. The gold insured was despatched from Johannesburg on October 2, 1899, and, while being carried by train, it was seized at the frontier of the Transvaal by the orders of the Government of the South African Republic. At that time war between this country and the Transvaal was imminent. On October 9, 1899, an ultimatum was issued by the Government of the South African Republic to the British Government, announcing that, if certain demands contained therein were not complied with, the refusal to comply with them by the British Government would be treated as a declaration of war at 5 o'clock on the afternoon of October 11. The defence set up was that the plaintiffs, being a limited company incorporated according to the laws of and domiciled in the territories of the South African Republic, were alien enemies of Her Majesty, and the loss, if by any peril insured against, was by an arrest, restraint, or detainment by the Government of the South African Republic incidental to actual or expected hostilities against Her Majesty, and made for a purpose connected therewith, namely, to supply the said Government with funds with which to levy war upon Her Majesty, as they were

(1) [1900] 2 Q. B. 339.

then purposing, and shortly afterwards proceeded, to do, and therefore the plaintiffs' claim was for an indemnity which was contrary to public policy. It was agreed that the Blue Books published by the Government should be treated as containing evidence of all the facts material to the case, and, further, that no dilatory plea should be set up based on the fact that the plaintiff company was alien and could not sue while the war lasted, but that the case should be dealt with as if the war were over.

The learned judge gave judgment for the plaintiffs.

April 23, 24, 25. *Joseph Walton, K.C.*, and *Lord Robert Cecil, K.C.* (*J. A. Hamilton, K.C.*, with them), for the defendant. The authorities shew that on grounds of public policy a contract of insurance against such a loss as occurred in the present case is invalid. The case falls within the principle which underlies the cases by which it was established that there cannot be a valid insurance by a British subject against capture by a British ship of the property of an alien enemy, because such an insurance is contrary to the interests of the State. Such an insurance made during the war is void; and, if the insurance has been effected before the commencement of the war, it is treated as containing an exception of such a loss: *Furtado* v. *Rogers* (1); *Kellner* v. *Le Mesurier* (2); *Gamba* v. *Le Mesurier* (3); *Brandon* v. *Curling*. (4) The principle of those cases applies, not only to losses to an alien enemy caused by acts done by the British Government in prosecuting the war, but also to losses to an alien enemy caused by such acts done by his own Government, the principle being that it is against public policy that a British subject should do anything which may enrich the hostile State, or assist it in carrying on the war by furnishing it with the sinews of war, or which may relieve its subjects from the stress of war. It is not necessary to the applicability of the principle that the act which causes

(1) (1802) 3 B. & P. 191; 6 R. R. 752.

(2) (1803) 4 East, 396; 7 R. R. 581.

(3) (1803) 4 East, 407; 7 R. R. 590.

(4) (1803) 4 East, 410; 7 R. R. 592.

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the loss should be an act of war, or have occurred after war was formally declared, or during an actual state of war. It is sufficient that it should have been done in contemplation of imminent war, and for the purposes of hostilities. At the time when the seizure of the gold in this case took place, negotiations between the two Governments were at a dead-lock, and all the circumstances pointed to the conclusion that war must almost immediately ensue, as it in fact did; and it is submitted that there can be no doubt under the circumstances that the gold was seized for the purpose of providing for the expenses of the war. The seizure of the gold was an act of hostility, though war did not then exist. An embargo laid upon a foreign ship followed by a declaration of war has been held to be equivalent to a capture for this purpose: *The Herstelder* (1); *The Boedes Lust.* (2) Under these circumstances it is against public policy that a British subject should contract to indemnify a subject of the South African Republic against such a seizure as took place here. The learned judge held that the plaintiffs, being a company constituted according to the laws of the Transvaal, must be treated as a Transvaal subject, and it is submitted that he was right in so holding. The test is whether, if there were an insurance of a subject of the South African Republic by a British subject in express terms against such a loss as occurred here, i.e., against a seizure of gold by the Government of the South African Republic for the purposes of anticipated hostilities between that country and this, such an insurance would be valid; if not, then the cases shew that an insurance in general terms cannot cover such a risk. The stress of war operates to compel the Government of the hostile State to come to terms through the pressure put upon the subjects of that State by the evils of war, and it is therefore contrary to the interests of this country that its subjects should indemnify the subjects of the hostile State against any of those evils: and this principle applies to a seizure of their goods by their own Government with a view to hostilities before they commence. It is a general principle that no transaction between a British subject and an alien enemy during war is

(1) (1799) 1 Chr. Rob. 114. (2) (1804) 5 Chr. Rob. 233.

valid, and, therefore, in a case where the insurance and the loss were both antecedent to any question of hostilities, the remedy by action on the contract of insurance is suspended till after the war is over; but it is agreed that the present case is to be dealt with as if the war were over, and therefore that principle is not relied upon.

[They also cited *Touteng* v. *Hubbard* (1); *Brandon* v. *Nesbitt* (2); *Aubert* v. *Gray*. (3)]

Lawson Walton, K.C., and *Carver, K.C.* (*Scrutton, K.C.*, with them), for the plaintiffs. There is no authority for the extension of the principle which invalidates any insurance of goods against British capture, or any insurance of the goods of an alien enemy, so far as the defendant seeks to extend it. The only rules established by the cases are—(1.) that insurance against acts of our own Government in the way of destroying an enemy's property or commerce is not valid, and (2.) that a British subject may not lawfully trade or enter into any transaction with an alien enemy, and therefore, of course, may not insure his goods. The second of these rules is not applicable here, because at the time when the insurance was effected, and at the time when the seizure of the gold took place, the war had not commenced, and it is impossible to say that subjects of the Government of the South African Republic were then alien enemies of this country. Contracts of insurance coming within the first of the above-mentioned rules will not be enforced, because it is deemed contrary to public policy that an alien enemy should be allowed to mitigate by insurance the losses which it is the policy of this country to inflict upon him by way of hostilities; but it is contended that the rule only applies to losses which occur after the state of war has commenced as a consequence of its existence: see *Kellner* v. *Le Mesurier* (4); *Gamba* v. *Le Mesurier* (5); *Brandon* v. *Curling*. (6) There is no authority for the extension of this rule of public policy to things done in view of the possibility or

(1) (1802) 3 B. & P. 291; 6 R. R. 791.
(2) (1794) 6 T. R. 23.
(3) (1861–2) 3 B. & S. 163, 169.
(4) 4 East, 396; 7 R. R. 581.
(5) 4 East, 407; 7 R. R. 590.
(6) 4 East, 410; 7 R. R. 592.

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probability of hostilities thereafter, except, perhaps, a dictum in *Aubert* v. *Gray*. (1) It may be admitted that the state of war may commence for this purpose before a formal declaration of war; but it cannot be suggested in this case that the seizure of the gold by the Transvaal Government was the commencement of war. It was not so treated by the English Government. It is submitted that it is not proved that this gold was seized for warlike purposes. It is quite consistent with the evidence that it was seized merely because in the prospect of war it was thought undesirable to allow the resources of the country to be exported. The rule as applicable to losses arising during a war is definite and intelligible, but it is difficult to see what the limits of such an extension of it as is suggested for the defendant would be; and it would render it impossible during a period of friction between this and another country, when hostilities seem likely and are apprehended, to tell whether contracts are or are not valid. The defendant seeks to bring the case within the strict rule that a British subject may not do anything which may have the effect of enriching or assisting a hostile State, or mitigating to its subjects the evils of war; but the principle of that rule depends really on the fact that there is an alien enemy in question, which was not the case here. It has already been pointed out that at the time when this seizure took place the subjects of the South African Republic were not alien enemies, as no state of war then existed; and, in answer to this attempt to stretch the doctrine with regard to public policy in such matters, it may be observed that, in point of substance, the payment of the insurance money to the plaintiffs would not in the least have the effect of enriching or assisting the hostile State, or mitigating to its subjects the evils of war, because the shareholders of the plaintiff company were subjects of nations other than the South African Republic. A doctrine by which a contract apparently innocent at the time when it is made is avoided by matter subsequent ought not to be extended to losses occurring before the actual commencement of war.

(1) 3 B. & S. 163, at p. 182.

[They also cited *The Ionian Ships* (1); *The Hoop* (2); Arnould on Marine Insurance, 2nd ed. vol. i. 98, 131; Duer on Marine Insurance, vol. i. pp. 414, 461, 555; *Campbell* v. *Innes* (3); *Simeon* v. *Bazett* (4); *Rotch* v. *Edie*. (5)]

Joseph Walton, K.C., in reply. It may be admitted that in the cases the doctrine on the subject will not be found expressly stated in such terms as to cover the present case, but the Courts in these cases were dealing with the circumstances of the particular case before them, and stated the rule as applicable thereto. The question is whether the principle upon which those cases were decided must not cover the present case.

Cur. adv. vult.

June 21. A. L. SMITH M.R. read the following judgment:— There is no case to be found in the books which covers the present; and we have had judgments of different eminent judges given upon totally different facts from those of the present case cited to induce us, if possible, to hold that in this case it is against the interest of this country—that is, against what is called public policy—that the defendant should be held liable in this action to pay, under the policy of insurance he underwrote for the plaintiffs, the loss the plaintiffs have undoubtedly sustained. Notably amongst these judgments we have been referred to the judgments of Lord Alvanley in *Furtado* v. *Rogers* (6), and of Lord Ellenborough in *Gamba* v. *Le Mesurier* (7), of the same learned judge in the same year in *Kellner* v. *Le Mesurier* (8), and of the same judge in *Brandon* v. *Curling* (9), as shewing principles which should be applied when considering a question of public policy as applicable to a policy of insurance effected in this country on the goods of enemies. In my opinion it is very important in this case, remembering what has been argued, to ascertain clearly and

(1) (1855) Spinks' Prize Court Cases, pt. i. 193.
(2) (1799) 1 Chr. Rob. 196.
(3) (1821) 4 B. & A. 423; 23 R. R. 328.
(4) (1813) 2 M. & S. 94.
(5) (1795) 6 T. R. 413; 3 R. R. 222.
(6) 3 B. & P. 191; 6 R. R. 752.
(7) 4 East, 407; 7 R. R. 590.
(8) 4 East, 396; 7 R. R. 581.
(9) 4 East, 410; 7 R. R. 592.

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keep in mind what are its special facts, in order that this Court may itself determine, applying the principles which are to be found in the judgments, whether it is against the interest of this country that the defendant upon the true facts of this case should be held liable to indemnify the plaintiffs for the loss of their gold which was underwritten by the defendant, and which was lost under the following circumstances.

The plaintiffs are a limited company, which for the convenience of carrying on its business was incorporated and registered in the Transvaal according to the laws of the South African Republic. Its shareholders are almost entirely resident outside that Republic and in Europe, and are not subjects of the Republic. The company has a London office and a London committee of management, and it carries on its business of extracting gold from its mines in South Africa and of sending such gold to this country and Europe for sale, and there dividing the profits among its shareholders. There is, in my judgment, no pretence for saying that the committee of management of this company or its shareholders, or the company itself as a legal entity, were de facto enemies of this country when the loss occurred. War had not then broken out; and, what is more, in my opinion they never were de facto enemies of this country. This company was in the habit before October 2, 1899, of getting the gold which it won and imported from South Africa covered by policies of insurance underwritten at Lloyd's, "at and from the mines in South Africa until its arrival in this country or Europe"; and, so far as concerns the policy now sued on, it is dated August 1, 1899, and is to follow and succeed an insurance for 10,000*l.* dated May 15, 1899. When the policy was effected, no question of war between this country and the Government of the South African Republic was in the contemplation of the parties; and the risks covered are declared in the usual form of a Lloyd's policy so far as regards capture, namely, "against enemies, pirates, rovers, arrests of all kings, princes, and peoples of what nation, condition, or quality soever." Whilst the gold covered by this policy was in transit to this country, it was, upon October 2, 1899, seized and taken possession of by the Govern-

ment of the South African Republic against the will of the plaintiffs when at a railway station in that country. There is no evidence of what has become of this gold excepting that it has been seized by the Transvaal Government and that it has never been returned to the plaintiffs; and to them from October 2, 1899, onwards it has ever been a total loss.

It was strenuously urged in the Court below, before Mathew J., by Mr. Joseph Walton for the defendant, that war had broken out before this seizure; but Mathew J. found, as was the fact, and it is now conceded on the part of the defendant, that war had not broken out upon October 2; for it did not break out until some time after, though it is true that the Blue Books, which, by agreement, constitute the sole evidence in this case, shew that upon October 2, 1899, war was imminent. The well-known ultimatum by Mr. Reitz, the State Secretary, demanding an answer from this country on or before Wednesday, October 11, 1899, at 5 P.M., was not sent until October 10, 1899; and Mr. Chamberlain has certified, which certificate is to be taken as evidence, that war did not break out until 5 P.M. on October 12. It is true that the plaintiff company is registered as a company in South Africa; but it is equally true that the beneficial ownership in the gold insured did not belong to persons subjects of the Government of the South African Republic and resident therein; and what is more important still to my mind is that neither the persons to whom the insured gold really belonged nor the company as a legal entity were in truth and in fact enemies of this country when the loss occurred; and, indeed, in my opinion, in truth and in fact, neither these persons nor the company have ever at any time been de facto enemies of this country.

The gold having been thus lost by being seized and captured by the South African Government, the plaintiffs now ask the defendant to make good this loss according to the terms of the policy underwritten by him; and what is his answer? It is said that it is against public policy—i.e., against the interest of this country—that he should do so; and thereupon this action is brought. Can any wilder suggestion be well made than that the repayment of this loss of their gold to the plaintiffs is in

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truth and in fact against the interests of this country? It certainly appears to me that this defence for not paying the loss incurred because of its being against public policy is, as a matter of fact, absurd, and I am not surprised that my brother Mathew has held that the defence was unfounded. The risks covered by the policy are against capture in the words above stated—namely, against arrests of kings, princes, &c. It is true that, as Lord Ellenborough pointed out in *Kellner* v. *Le Mesurier* (1), these general words must be read with this exception and qualification annexed to them—namely, that they are limited to an insurance of goods other than goods belonging to enemies of this country, for otherwise they would cover enemies' property, the destruction of which it was the object of this country when at war to effect; and thus the destruction of this property by this country when at war would be rendered ineffectual, if a subject of this country could indemnify an enemy against the consequences of war with this country. In my judgment, "enemy," as regards the application of this public policy, means a real de facto enemy, and not a mere possible technical enemy, like the company in this case. That the above indemnity of a real enemy de facto of this country would be against the interests of this country when at war, and therefore against public policy, I do not doubt. But where upon the facts of this case can it be found that the policy of insurance sued on covered a loss sustained by a real enemy of this country? As a matter of truth, the suggested loss to a real enemy of this country is all fiction. Notwithstanding the learned and ingenious arguments of Mr. Joseph Walton for the defendant, I am wholly unable to apply the suggested public policy to the facts of this case.

It was urged that the gold taken by the Transvaal Government was taken for the purposes of war. Be it so, though there is no proof of this; and it was argued that, the gold being taken for war purposes, it was the same as if the gold had thus become a gun or other implement of war, which it was the object of this country to destroy. This, in my opinion, is another fiction and wild suggestion. If by this is meant

(1) 4 East, 396; 7 R. R. 581.

that the gold became likened to a gun belonging to an enemy, in which I certainly do not agree, then I would point out that the defendant did not insure a gun, and how can public policy be invoked? In my opinion the arguments addressed to us when applied to the facts of this case have no substance whatever in them. I should point out that the parties have agreed not to raise the defence, which would have been a good defence if the facts supported it, which they do not—namely, that the payment of the policy moneys by the defendant to the plaintiffs would be trading with an alien enemy and therefore unlawful. This is not insisted on, for by agreement between the parties the case is to be treated as if the war was over and no dilatory plea was to be pleaded.

It was next argued that it could be extracted from the judgments cited that any contract which directly or indirectly assisted a foreign State for the purposes of war against this country, no matter how long before war actually broke out, was contrary to public policy. My first answer is that I do not find this laid down in any of the judgments cited: secondly, it would, in my opinion, be contrary to the interests of this country to hold that such contracts, entered into during negotiations preceding a war, which might never result in war, were contracts against the interests of this country to enforce; and, lastly, but by no means least, the contract in this case was not entered into for any such purpose—i.e., for assisting a foreign State in making war against this country. There was one other public policy stated, which I think exists, namely, that it is against the interests of this country that a subject of this country when at war should relieve an enemy of this country against the calamities of war. Apart from the plaintiffs not being de facto enemies, which I have pointed out above, can any stretch of imagination lead any one to suppose that, if the defendant pays to the plaintiffs the moneys secured by this policy, one single penny of those moneys would ever go towards relieving an enemy of this country against the calamities of the South African war? I certainly cannot do so. Here is another fiction. I agree with Mathew J., and am of opinion that this appeal must be dismissed. In my

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judgment the public policies which do exist have no application whatever to the real facts of this case, and it would be against all reason to hold that they had.

VAUGHAN WILLIAMS L.J. read the following judgment:— This is an action brought against underwriters to recover in respect of a loss of gold on its transit from Johannesburg to the United Kingdom. The loss occurred in this way. The South African Republic, not being at war with us, but war being imminent, "commandeered" some gold, the property of the plaintiffs, a Transvaal corporation, that is, of a subject of the South African Republic, and did so with a view to the imminent war which might or might not break out with Great Britain. The general terms of the policy are sufficient to cover this loss; but it is said that the loss arose by a seizure against which a British subject could not consistently with his public duty insure in direct terms, and that, wherever the generality of the terms of assurance might in their actual application produce, if effect were given to them in their extended sense, a contravention of public interest, the insurance must be construed in such a manner as to exclude the particular event or peril which could not for the reason above mentioned be made the subject of a legal insurance in direct terms by a British underwriter. This is the law as laid down by Lord Ellenborough in the cases of *Kellner* v. *Le Mesurier* (1), *Gamba* v. *Le Mesurier* (2), and *Brandon* v. *Curling* (3); and also by Lord Alvanley in the case of *Furtado* v. *Rogers* (4); and it follows, in my view, that in the present case one must take the particular loss and ask oneself whether the insurance in express terms against this loss would be inconsistent with the public duty of a British underwriter. If it would be, the contract would be illegal, and the policy must be construed as if it contained a proviso excluding from the policy such a loss. Lord Ellenborough in *Brandon* v. *Curling* (5) gives two instances of the proviso which must be read upon principles of public policy into the instrument of

(1) 4 East, 396; 7 R. R. 581.
(2) 4 East, 407; 7 R. R. 590.
(3) 4 East, 410; 7 R. R. 592.
(4) 3 B. & P. 191; 6 R. R. 752.
(5) 4 East, 410, at p. 417.

insurance to prevent its application to a particular risk, the insurance against which would be repugnant to the interests of the State. One instance is a proviso that the insurance shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and assurer. The other instance is a proviso that it shall not extend to cover any loss happening in the course of any contraband adventure in which the goods would become liable to seizure as forfeited by the laws of the country; and he says: "More instances might be put of similar implied exceptions which may arise out of the general terms of this contract." Lord Ellenborough does not say, and, in my judgment, does not intend to say, that the existence of a state of war between the respective countries of the assured and assurer is the only instance in which the relations of the two countries may be such that it would be injurious to the country of the assurer to allow a subject of that country to indemnify a subject of the other country against a particular loss. No doubt the application of the general rule that it is illegal for a British subject to enter into a contract of insurance inconsistent with his public duty takes place in most cases where the risk is a risk of capture in the course of war between the two countries by the warships of the country of the underwriter; but the principle that a British subject cannot make a contract of insurance contrary to his public duty is not limited to such cases; and Erle C.J., in delivering the judgment of the Exchequer Chamber in *Aubert* v. *Gray* (1), seems to take the view that an insurance against a loss arising from an embargo placed by the Government of the country of the assured on ships of subjects of that country, with a view to expected hostilities with the country of the assurer, would be contrary to public policy, and, therefore, an insurance which a British subject could not take upon himself. But, however this may be, the principle is clear that a British subject cannot make a valid insurance if such insurance is repugnant to the interests of his country; and the question which we have to answer in this case is whether it is against public policy that a British subject should

(1) 3 B. & S. 163.

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contract to indemnify a subject of the South African Republic against this particular loss—that is to say, the loss arising from the fact that the South African Republic, not being at war with us, have "commandeered" some gold, the property of a Transvaal corporation, that is, of a subject of the South African Republic, and have done so with a view to the imminent war which may or may not break out with Great Britain. I cannot make any distinction between this Transvaal corporation, whoever the corporators may be, and any other subject of the South African Republic.

Now, what was the character and purpose of the seizure of this gold? It was "commandeered." It was not seized under the authority of the revenue law of the land; it was seized as a matter of military necessity. It was seized to provide the Government of the South African Republic with gold for the purpose of the threatened war with Great Britain in case it should break out. The gold might be applied in buying munitions of war, in paying soldiers, or in paying judges or civil servants, or in buying provisions; one cannot say. All one can say is that the evidence makes it clear that it was seized with a view to the threatened war with Great Britain. I do not think that the particular application, or intended application, of gold thus seized and for such a purpose is of any great importance. The material fact is that there was this extraordinary seizure of gold, a seizure which the Transvaal Government could only justify to themselves on the ground of the necessities of the impending war—that is, a seizure with a view to the threatened war with Great Britain. Is it illegal for a British subject to contract to insure Transvaal subjects against such a seizure? To hold that it is illegal is, it is true, to extend the principle established by Lord Ellenborough and Lord Alvanley to a case to which it has not up to this time been extended. But I take it that, if it is made out that it would be injurious generally to the State to allow such a contract by a British subject to be valid, the principle must be applied, although there may be no previous instance of its application to this particular case. I do not think that the question, whether it is against the interests of the State to

allow the assured to enforce against the underwriters the contract to indemnify the assured against this seizure, depends on whether the seizure was an act of hostility in the sense of being an act of war. In my judgment it clearly was not an act of war, and could not be so treated by our Government, and I entirely agree that the "commandeering" seizure by the Transvaal Government of this gold belonging to a Transvaal subject took place in a time of peace before the war had begun. I think that on the breaking out of the war the Transvaal corporation to whom the gold belonged became an "alien enemy," and in my judgment the question whether it is against the interest of the State to allow this contract to be enforced against the underwriters depends, not on whether the seizure was an act of war, but on whether it is against the interest of the State that a British subject should contract to indemnify an alien against a levy made on him by his Government for the purpose of a war against this country. This question obviously cannot be determined by considering how matters stood immediately after the gold was seized. The right to raise this question as to whether the contract is void as being repugnant to the interests of the country of the underwriters is, of course, not affected by any agreement between the parties to treat, for the purposes of this action, the war as over. Such an agreement merely goes to the pleading of a temporary bar, to the rule that an "alien enemy" cannot sue during the continuance of war. I am not sure that the Court ought to give effect even to such an agreement, because the rule against an "alien enemy" coming into Court is itself based on public policy; and I doubt if the parties to an action can waive such a rule if the fact of the plaintiff being an "alien enemy" appears upon the record. But I wish to point out that the suspension of the cause of action during the war does not prevent a contract entered into previously to the commencement of hostilities to indemnify an "alien enemy" from losses incurred during the war from being injurious to the interests of the country of the underwriter. This is pointed out by Lord Alvanley in *Furtado* v. *Rogers*. (1)

(1) 3 B. & P. at p. 199.

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The question, whether it is against the interest of the State that a British subject should contract to indemnify an alien against a levy made on him by his Government for the purpose of an imminent war against this country, does not, to my mind, in any way depend on the finality of the intention of the Transvaal Government to enter upon a state of war with this country. In my judgment the question, whether the contract of indemnity is repugnant to the interests of the country, depends upon the character of the act of seizure which brings about the loss. In this case the seizure by the Transvaal Government of the gold of its own subject, although an act of the Government, was not, as I have already pointed out, an act done in accordance with the ordinary law of the country. It was not done in the due course of law; it was manifestly an extraordinary act done to meet an extraordinary occasion, when clearly war against England was immediately anticipated. It was not an act of war, nor an act of hostility in the sense of an act of war, but it was an act specifically done for the purpose of the prosecution of expected war against England. The question is whether this manifest character and purpose of the seizure make it repugnant to the interest of Great Britain that British subjects should contract to indemnify Transvaal subjects against a loss arising from such a seizure. I do not think that the legality of an undertaking to indemnify the subject of another country against the levy by his own Government on his goods, for the purpose of an expected war against the country of the underwriter, can depend upon the accident of the expected war in fact occurring. Such an undertaking to be impugned as contrary to public policy must be an undertaking which, if expressed in terms in the policy, would be illegal; it must be illegal from the first or not at all. Take the case of an express contract to indemnify the assured in case of the capture of his ship by the warships of the country of the underwriter in the course of war between the respective countries. Such a contract is void ab initio, and the application of the assurance to such an event would ab initio be excepted from a policy couched in general terms wide enough to cover such a capture. The accident of no war occurring

would merely prevent any claim arising, but would not affect the legality of the contract or its construction. The occurrence of war may suspend the remedy of the assured, but cannot alter his contractual rights.

The only question to my mind is, Can a British subject legally contract to indemnify the subject of a foreign State against a loss by the forcible seizure by his Government of his property for the purpose of an imminent war between Great Britain and that State? That depends on the question whether the performance of such a contract would be injurious to Great Britain. It is said to be injurious because it increases the resources of the foreign country for the expected war against Great Britain, both by relieving the foreign State from recouping their subject the value of the goods which it has seized for the purpose of war against us, and for which it has given a receipt, and by the relief such an indemnity will give the foreign subject against the burden of the war in the event of the expected war actually taking place. Is it not contrary to public policy that a British subject should in effect indemnify a foreign Government against expenses incurred by them for the purpose of expected war against us, and give the foreign subject an indemnity which will greatly relieve him from the burden of the expected war in the event of its taking place? I think that such an indemnity, if carried into effect, would undoubtedly be injurious to Great Britain. The assured is complaining of a loss inflicted on him by the Government of the State of which he is a citizen; and the benefit of the indemnity, by subrogation or otherwise, would in effect go to a Government for whose acts there are no slight grounds for saying he is responsible; for it was decided in *Conway* v. *Gray* (1) that an assured was so identified with the Government of his country that he could not recover under a clause in a policy in terms covering all arrests and detentions of princes if the arrest or detention was the act of the Government of the assured's own country. *Conway* v. *Gray* (1) and the other cases based upon the fiction that every subject

(1) (1809) 10 East, 536.

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consents to and adopts as his own every act of the Government of his State were overruled by the Court of Exchequer Chamber in *Aubert* v. *Gray* (1), which was a case of an embargo put by the Spanish Government on a Spanish ship for the purpose of war with Morocco; but Erle C.J., in delivering the considered judgment of the Court, says (2): "This judgment recognises a marked distinction between an embargo in a time when there is peace between the countries of the insurer and the assured, laid on for a purpose wholly unconnected with hostility, either existing or *expected*, and an embargo connected with such hostility; therefore this judgment does not interfere with any of the decisions on points connected with war." This passage in the judgment of Erle C.J. leaves it open to doubt whether he means that in the case of an embargo laid on for a purpose connected with hostility, either existing or expected, the theory of the adoption by the subject of the act of his Government is still law, or whether he means that the theory of identity of the subject and Government is wholly gone, and that the assured is unable to recover in cases where the arrest or detention is laid on for a purpose hostile to the country of the underwriter, because to allow the assured to recover in the British Courts would be contrary to public policy. I am inclined to think he means the latter; but, whichever he means, he was dealing with the case of a seizure of the property of the assured by the Government of his own country; and it seems to me that there is great difficulty in saying that the passage does not cover the present case, for it is impossible to say that the "commandeering" of this gold was wholly unconnected with hostility, either existing or expected. On the whole, I think it contrary to public policy that an underwriter should insure against such a risk, and that it is contrary to public policy that this action should be maintained.

ROMER L.J. read the following judgment:—In my opinion this appeal should be dismissed. I think that the rights of the

(1) 3 B. & S. 163, 169. (2) 3 B. & S. at p. 182.

parties to this action must be determined by considering how matters stood immediately after the gold was lost by the seizure of it by the Transvaal Government. In saying this I, of course, recognise that subsequent events may be regarded if, and so far as, they tend to shew what was the then position of affairs. At that time there was peace between the South African Republic and this kingdom. The act of seizure cannot, in my opinion, be treated as an act of hostility against this country, and certainly it was not so treated by our Government. It cannot, in my opinion, be regarded as the commencement of the war which subsequently broke out. At that time, and for an appreciable time after, the plaintiff company was not an alien enemy, though for the purpose of my judgment I shall assume that the company is to be treated simply as an ordinary subject of the South African Republic. The war did not commence until about a week after the seizure, and meantime negotiations between the two Governments continued. It is true that after war began, and so long as it continued, as between the two antagonistic countries, the plaintiff company, which might then be regarded as an alien enemy, would not have been entitled to enforce its right against the insurers under the contract of insurance, assuming the right to exist. During the war that right would have been suspended. On the termination of the war the right would revive: and it is common ground that we are to deal with this action on the footing that the war is ended; and, seeing that the Transvaal is now annexed, there is nothing to prevent the Court's acting on this view.

The question then is—Were the defendants, under the circumstances existing at the date of the seizure of the gold, freed from liability on their contract of insurance, although its terms were large enough to cover the plaintiffs' loss? I think not. No authority has been cited which really supports the view urged on behalf of the defendants. I think that view ought not to be adopted by the Court. The decided cases, no doubt, shew that a contract of insurance, though its terms may be large enough, will be held not to cover a loss, which, if it had formed the subject of a separate insurance, would not

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be recoverable in our Courts. If, then, this seizure of the gold had been insured against by a separate contract, would there be anything in such a contract to render it not enforceable in our Courts? I think not. Such a contract would not fall within any of the classes of contract held by existing authorities to be not enforceable. It would not be a contract with an enemy of this country, nor one to indemnify a person against a loss arising from an act of our Government and intentionally inflicted upon him. It would not be a contract obviously antagonistic to the interests of this country, like one dealing with arms or munitions of war intended to be used against this country, nor one to indemnify a subject of a foreign Government against an act committed by that Government which was an act of hostility against this country, or which could be regarded as the commencement of war, or which would be like an embargo connected with hostility against this country perfected by the subsequent outbreak of war, such as is in my opinion referred to by the passage as to an embargo in the judgment of Erle C.J. in *Aubert* v. *Gray* (1) mentioned by my brother Vaughan Williams. It would, no doubt, be a contract to indemnify the subject of a foreign Power, at the time at peace with us, against a pecuniary loss inflicted on him by his Government with a view of strengthening the resources of that Government at a time when relations between it and our Government were strained. But, if nothing more could be said against the contract, I think there would not be sufficient grounds for our Courts refusing to enforce it. The strained relations might not lead to war, and in that case it is difficult to suppose that the contract could be treated as invalid because of the above-mentioned object of the foreign Government at the time of seizure, or because the seizure may have been unjustifiable as between that Government and its subject; and even if war ultimately ensued, that fact could not have a relation back so as to change the rights of the parties which were fixed as at the date of the loss suffered. It is, however, said on behalf of the defendants that the Courts ought to refuse to enforce such a contract if at the time of the act of

(1) 3 B. & S. 163.

the foreign Government that Government had an intention of shortly afterwards making war upon this country. For it is said that it would be contrary to the policy of this country in such a case to allow the contract to be enforced; and that, therefore, our Courts ought, where such a case is said to arise, to try the question as to what was the intention of the foreign Government at the time of its act. I do not think that this contention is well founded. I do not consider that it is in accordance with the interest or policy of our country or Government, or right, in a case where an act of a foreign Government not in itself hostile to this country has to be considered, and where our Government has determined, notwithstanding the act, to treat the foreign Government as still at peace with us, and to continue negotiations with that Government, that that Government should be treated or regarded by our Courts as having at the time of that act formed an intention irrevocably hostile to this country. I can imagine few things likely to embarrass our Government more, at a time when it is our policy to treat the foreign Government as not being hostile, than for our Courts to be obliged (as they might be) to have to decide as a question of fact what was the "intention" at the time, or a short time previously, of the foreign Government. The question of "intention" of a foreign Government is one very difficult to inquire into or to determine. Especially would this be the case if no war ensued and the two countries became quite friendly; and yet if "intention" had to govern the rights of the parties to the contract our Courts might be obliged to ascertain the intention at the time of the loss, even if no war ensued. A subsequent change of intention on the part of the foreign Government could not change the rights of the parties; and it is impossible to say that any "intention" is irrevocable and could not be changed. It appears to me that in such a case as we are considering these Courts ought not to be asked to embark upon a consideration of the question as to the intention of a foreign Government at a time when admittedly it is or was at peace with this country, and is or was being treated by our Government as not hostile. I think that the intention of a foreign Government at any given time ought to

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be treated by these Courts, for such a purpose as that I am now considering, as conclusively determined by the way in which our Government chooses or has chosen to deal with that foreign Government and its acts, and that, where our Government has not treated the foreign Government as being hostile at a particular time, our Courts ought not to try to ascertain, even by merely regarding its acts, what was then in the minds of the King, President, or responsible Ministers or authorities of the foreign Government. In the result I think that it would not be in accordance with the policy and interests of our Government and country, or proper for this Court, to hold that the contract of insurance in this case, as applied to the loss in question, was invalid, or ought not to be enforced. For these reasons I think that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *William A. Crump & Sons.*
Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

E. L.

[IN THE COURT OF APPEAL.]

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1901
May 10.

DAUNCEY *v.* HOLLOWAY.

Defamation—Slander—Words not actionable per se—Imputation of Insolvency against Solicitor—Words spoken in relation to his Profession.

In an action of slander it was proved that the defendant spoke of the plaintiff, who was a solicitor, upon one occasion: "Have you heard about our neighbour along here? They tell me he has gone for thousands instead of hundreds this time"; and upon another occasion: "Have you heard anything about Mr. Dauncey? It seems to be a worse job than the other was. Miss Allen told me Mr. Dauncey has lost thousands":—

Held, that, in the absence of special damage, the words were not actionable, as they were not reasonably capable of being construed as conveying an imputation on the plaintiff in his business as a solicitor.

APPLICATION for a new trial in an action tried before Wright J. and a jury.

The action was to recover damages for slander. The plaintiff was a solicitor practising at Wotton-under-Edge, Gloucestershire.

The statement of claim alleged that the plaintiff, in the course of his business or profession, was in the habit of receiving moneys in trust for and on behalf of clients for investment and otherwise; and that the defendant falsely and maliciously spoke and published of the plaintiff, in relation to his business or profession of a solicitor and the carrying on and conducting thereof by him and in his capacity as a solicitor, to one Sydney William Anderson the words following: "Have you heard about our neighbour" (meaning the plaintiff) "along here? They tell me he has gone for thousands instead of hundreds this time," and (on Anderson asking the defendant "Who do you mean?"), "The lawyer in Orchard Street," and (on asking the defendant "Do you mean Mr. Dauncey?") "Yes"; meaning thereby that the plaintiff was insolvent, and that he was unable, and would be unable, to pay his clients the moneys received or held by him in trust for or on behalf of them, and that the plaintiff had misappropriated moneys

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belonging to or payable to his clients, and that he was unfit to carry on his said business or profession, and to receive or hold moneys in trust for or on behalf of clients.

The statement of claim further alleged that on another occasion the defendant spoke and published of the plaintiff, in his capacity as a solicitor and in relation to his said business or profession and the carrying on or conducting thereof by him, to one William Watken the words following: "Have you heard anything about Mr. Dauncey? It seems to be a worse job than the other was. I was putting up a bell in Miss Allen's shop, and Miss Allen told me Mr. Dauncey" (meaning the plaintiff) "has lost thousands"; the innuendo alleged being the same as that given above.

The defendant in his statement of defence denied (inter alia) that he spoke and published the words of the plaintiff in his capacity of a solicitor, or in relation to his business or profession, or the carrying on or conducting thereof by him, and contended that the statement of claim disclosed no cause of action.

It appeared from the evidence at the trial that the words complained of were spoken by the defendant on each occasion in the street at Wotton-under-Edge when meeting an acquaintance. The plaintiff in his evidence stated that his business was mainly conveyancing and not contentious, that he received trust moneys from his clients and moneys on purchases and sales for them, and that he found mortgages for them and put their money out for them. One of the witnesses, to whom the first alleged slander was spoken, stated in his evidence that he understood that the words "gone for thousands" meant that the plaintiff had gone bankrupt. The plaintiff alleged special damage, but failed to prove it.

At the close of the plaintiff's case it was submitted that there was no case to go to the jury, on the ground that there was nothing to shew that the words were spoken of the plaintiff in relation to his business as a solicitor, and that therefore the words were not actionable per se.

Wright J., after ruling that there was no evidence of special damage, delivered the following judgment: "Now, if

there was no special damage, on what grounds are the words actionable? They do not allege any crime; they do not allege a particular kind of infectious disease; they do not allege any other of the peculiar matters for which slander may be actionable without special damage, unless they ought to be construed as impugning the capacity or conduct of the plaintiff in the way of his profession as a solicitor. It is not alleged in the statement of claim that he carried on any other profession than that of a solicitor. It is alleged that as a solicitor he was in the habit of receiving moneys in trust for and on behalf of clients for investment. It is not alleged that he carried on any other business as a scrivener or anything else. There has been no attempt to attach any special or artificial meaning to the words used. The words used were in one case, 'They tell me he has gone for thousands instead of hundreds this time,' and on the other occasion, 'Miss Allen told me Mr. Dauncey has lost thousands.' I am inclined to think, in deciding whether there is any reasonable evidence to go to the jury of an imputation upon the plaintiff in the way of his trade or profession, that those two forms of statement ought to be considered together in order to see in what sense the defendant was using the language. To say merely of the plaintiff that he has lost thousands is, to my mind, clearly not sufficient. To say that he has gone for thousands instead of hundreds this time is a little more on the line; but I think, on the whole, even if it is confined to the words 'gone for thousands instead of hundreds this time,' those words are not reasonably capable of being construed as imputing to the plaintiff misconduct or incapacity in his profession or business as a solicitor. The innuendo attached by the statement of claim to the words used is not pointed to bankruptcy. The plaintiff himself says that the meaning of the words is that the plaintiff was insolvent, and that he would be unable to pay his clients the moneys received or held in trust on their behalf. The words are not reasonably capable of sustaining even that innuendo in its widest sense; there is no suggestion in the innuendo that the words imputed bankruptcy, and as that is not suggested, and bankruptcy is not the natural and reasonable meaning of

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the words 'gone for thousands instead of hundreds,' I do not think that there is any imputation on him which I can leave to the jury as reasonably intended by the language used. Supposing even that the plaintiff had been adjudicated a bankrupt, that of itself would not establish that he was unfit to carry on his business as a solicitor. It would then become a matter for the proper authorities to consider whether his conduct in the matter of the bankruptcy had been such as to justify them in withdrawing his certificate. But there is no law that I know of which declares a man unfit to practise as a solicitor simply because by misfortune he may have been adjudicated a bankrupt. I think, therefore, taking the language as alleged in the pleading and proved in evidence and the innuendo attached to the words in the pleadings, that there is nothing which the defendant can reasonably be called upon to answer. I must, therefore, direct judgment for the defendant."

Judgment was accordingly entered for the defendant.

The plaintiff appealed.

A. H. Spokes, for the plaintiff. The learned judge was wrong in withdrawing the case from the jury. There was evidence that the words were spoken of the plaintiff in relation to his profession as a solicitor, and, if that be so, they are actionable without proof of special damage. The plaintiff was in the habit of receiving money on behalf of clients, and he used to hold moneys of his clients for investment on mortgages and other securities. He was thus carrying on, as many solicitors do, a business similar to that formerly carried on by a money scrivener: *Adams* v. *Malkin* (1); *Hutchinson* v. *Gascoigne*. (2) The Bankruptcy Act (21 Jac. 1, c. 19), s. 2, defines a scrivener as one who receives other men's moneys or estates into his trust or custody. Such words as those complained of in the present case, if spoken of a scrivener, would have been actionable per se: 1 Rolle's Abr. p. 59. To say that the plaintiff has "gone for thousands" is to impute insolvency to him. That is the reasonable meaning of the words, and there was evidence that one of the persons to whom the words were

(1) (1814) 3 Camp. 534; 14 R. R. 837. (2) (1817) Holt, N. P. 507.

spoken understood them as meaning that the plaintiff had become bankrupt. Such an imputation on any solicitor, especially on one carrying on the class of business carried on by the plaintiff, is actionable per se, as it affects or touches him in his profession. In *Whittington* v. *Gladwin* (1) it was held that words imputing insolvency to an innkeeper were actionable per se, Abbott C.J. saying that such an imputation was calculated to prevent him from having that credit which is at least useful, if not necessary, in his business; and that, therefore, the words were likely to be injurious to him. So here the confidence which clients have in the plaintiff will be shaken by the imputation of insolvency, and clients will no longer trust him with their money. In this way his credit will be injured. In *Doyley* v. *Roberts* (2) the slander complained of was that the plaintiff had defrauded his creditors and had been horsewhipped off the course at Doncaster. The plaintiff there was not only an attorney, but he was also largely engaged in sporting transactions on the turf, and in respect of those transactions he had incurred certain debts. The jury found that the words were not spoken of the plaintiff in his business of an attorney, and the Court held that that finding was conclusive, and that the words were not actionable per se. In that case, however, the Court held that the question was rightly left to the jury to say whether the words were spoken of the plaintiff in his profession. That course ought to have been adopted in the present case. The plaintiff is, therefore, entitled to a new trial.

A. T. Lawrence, *K.C.* (*Stuart Bevan* with him), for the defendant. There was no evidence to go to the jury that the words were spoken of the plaintiff in relation to his business as a solicitor. The words were spoken in conversation with persons whom the plaintiff met in the street. To say that a solicitor has lost thousands or has gone for thousands is no imputation upon him either in his character of a solicitor or otherwise. To say that a merchant or trader is bankrupt or insolvent is actionable per se because it must affect his credit, without which he could not carry on business. In the case of

(1) (1826) 5 B. & C. 180; 29 R. R. 212.

(2) (1837) 3 Bing. N. C. 835; 43 R. R. 810.

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a solicitor or other professional man, in order to render the words actionable per se, they must impute to the plaintiff some want of personal fitness to carry on his profession, such as a want of honesty, capacity, or fidelity: *Ayre* v. *Craven*. (1) The words must touch him in his office, profession, or trade: Com. Dig., Action upon the Case for Defamation, D. 27; *Doyley* v. *Roberts*. (2) The words here, when reasonably read, do not impute to the plaintiff any want of personal fitness to carry on his profession as a solicitor. There is no evidence that the plaintiff carried on the same class of business as was formerly carried on by a scrivener. A scrivener's business was to receive from clients money which he kept in his own name until he found suitable securities for investment, and for this he was paid a commission. He exercised his own discretion as to how the money should be invested. The plaintiff did not carry on any such business. He merely carried on the ordinary business of a solicitor, part of that business being to receive moneys for clients upon sales and investments. The learned judge was therefore right in ruling that there was no evidence to go to the jury.

A. H. Spokes, in reply. To impute insolvency to a solicitor who is in the habit of receiving clients' moneys touches him in his profession, and is actionable per se. If such words are actionable in the case of an innkeeper, a fortiori they must be actionable in the case of a solicitor. They tend to make people distrust him, and so affect his credit.

A. L. SMITH M.R. I confess that at first I felt some difficulty about this case, and I was inclined to think that there was evidence to go to the jury. However, after having carefully considered the excellent judgment of my brother Wright, I have come to the conclusion that he was right in holding that the words complained of are not reasonably capable of being taken as conveying an imputation of unfitness in the plaintiff to carry on his business as a solicitor. I do not think that we can say that the words are reasonably capable of conveying an imputation on the plaintiff in his

(1) (1834) 2 A. & E. 2; 41 R. R. 359. (2) 3 Bing. N. C. 835; 43 R. R. 810.

character as a solicitor, and, that being so, in the absence of special damage the action is not maintainable. I feel that if we were to accede to the argument which has been pressed strongly upon us on behalf of the plaintiff we should be relaxing the very salutary rule laid down in olden times restricting actions of slander, where no special damage is proved, to a very limited number of cases, and we should be opening the door to many actions of this kind. I am not myself prepared to do that. It is important to consider, not only what are the words complained of, but also the circumstances under which they were uttered. They were spoken by the defendant in the course of conversation with some friends whom he met in the street. The plaintiff has picked out two remarks made by the defendant. On one occasion the defendant said to a friend whom he met, "Have you heard about our neighbour"—that is, the plaintiff—"along here? They tell me he has gone for thousands instead of hundreds this time"; and on the other occasion the defendant said, "Have you heard anything about Mr. Dauncey? It seems to be a worse job than the other was. I was putting up a bell in Miss Allen's shop, and Miss Allen told me Mr. Dauncey has lost thousands." The plaintiff at first tried to prove special damage, but, having failed to do so, he now contends that there was evidence upon which the jury might find that the words were spoken of him in relation to his profession as a solicitor, and that if the jury so found they are actionable per se. I do not agree. The words do not, in my opinion, reasonably convey any imputation of impropriety or misconduct on the part of the plaintiff in relation to or in connection with his profession or business, or of unfitness to carry on his profession or business in a proper and satisfactory manner. To my mind the two expressions—that the plaintiff has gone for thousands or has lost thousands—mean very much the same thing, namely, that the plaintiff has lost a considerable sum of money. It would not be reasonable to say that they impute to him any want of capacity to carry on the business or profession of a solicitor. For these reasons I think that the judgment of the learned judge was right and should be affirmed.

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VAUGHAN WILLIAMS L.J. I agree. I have nothing to add to Wright J.'s judgment except this—that when our ancestors years ago drew the distinction between libel and slander they exercised that kind of wise discretion which they always exercised over the whole field of the common law. It would, to my mind, be very dangerous for us nowadays to relax in any way the rule of law which confines actions for spoken words, in the absence of proof of special damage, to a very limited number of cases.

ROMER L.J. I am of the same opinion. When the evidence is carefully looked at it appears pretty clear that the plaintiff was not carrying on any business other than that ordinarily carried on by a solicitor, and that there is nothing in the evidence to shew that he was engaged in any special class of business which would render the words here complained of a slander upon him in that special business.

Application dismissed.

Solicitors for plaintiff: *Oldman, Clabburn & Co.*

Solicitors for defendant: *Carthew & Wheeler, for Tanner & Clarke, Bristol.*

A. M.

[IN THE COURT OF APPEAL.]

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ROSE *v.* BUCKETT.

Bankruptcy — Property passing to Trustee — Right of Action — Action for Trespass and Conversion — Claim for Personal Annoyance — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 54, 168.

In an action for trespass and seizure of goods, the plaintiff alleged damage to the premises, damage to the goods, and personal annoyance to himself and family. It being admitted that no substantial damage was done to the premises or to the goods :—

Held, that upon the bankruptcy of the plaintiff the right of action did not pass to his trustee in bankruptcy.

APPEAL from a decision of Grantham J.

The action was brought by the grantor of a bill of sale for trespass and for seizure and conversion of the plaintiff's goods.

By his statement of claim (paragraphs 2, 3, and 4) the plaintiff alleged that on three different occasions the defendant Margaret Buckett, by her agents and servants, the other defendants, had wrongfully entered the plaintiff's house, and had remained there for a day or longer, and had wrongfully seized the plaintiff's furniture, goods, and effects which were upon the premises, and had refused either to leave the premises or to give up the said goods and effects when requested to do so, but had converted the same in part to their own use.

Paragraph 5 of the statement of claim was as follows :—

"By reason of the foregoing the plaintiff has suffered damage, personal inconvenience, and annoyance to himself and family, by being wrongfully deprived of his property and of the quiet enjoyment of his house and premises from time to time by the defendants as aforesaid."

The plaintiff claimed damages from the defendants "for the aforesaid wrongful entry to his said premises, and for wrongful seizure and conversion of his said furniture, goods, and effects as aforesaid." The defendants justified their conduct under the provisions of s. 7 of the Bills of Sale Act Amendment Act, 1882, and they denied the conversion. The plaintiff in reply

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alleged that the bill of sale did not comply with the requisitions of the Act.

After the cause was set down for trial the plaintiff became bankrupt, and before the jury were sworn the defendants applied to Grantham J. for an order to stay proceedings in the action upon the ground that all the causes of action had become vested in the trustee in bankruptcy, the official receiver. Upon this application the plaintiff admitted that no substantial damage had been done to the premises or to the goods, and put forward the personal annoyance to himself and family as his main ground of complaint. The learned judge thought that this was not a case in which the plaintiff could claim vindictive damages, and consequently that the right of action passed to the trustee in bankruptcy. He therefore granted a stay of proceedings.

The plaintiff appealed.

W. R. Warren, for the plaintiff. The question is whether the right of action in this case passes to the trustee in bankruptcy or remains in the bankrupt. There can be only three kinds of cause of action here—damage to the goods, damage to the premises, and damage to the individual. It is admitted that there was no damage done to the goods or the premises, and the only cause of action which remains is damage to the individual. In an action of trespass the plaintiff has a cause of action for annoyance to himself and family occasioned by the invasion of his property. That cause of action remains in the bankrupt even though there are other claims for damage to property: *Clark* v. *Calvert* (1); *Beckham* v. *Drake* (2); *Spence* v. *Rogers* (3), affirmed sub nom. *Rogers* v. *Spence*, first by the Court of Exchequer Chamber (4), and ultimately by the House of Lords. (5) Lord Campbell there suggests that in a mixed case of injury to the person and injury to the property the law would give an action to the bankrupt for the personal injury, and an action to the assignee for the injury to the property,

(1) (1819) 8 Taunt. 742; 3 Moo. 96; 21 R. R. 528.
(2) (1849) 2 H. L. C. 579, 629, 634.
(3) (1843) 11 M. & W. 191.
(4) (1844) 13 M. & W. 571.
(5) (1846) 12 Cl. & F. 700.

thereby shewing that the damage to the person and the damage to the property may be separated.

[COLLINS L.J. Suppose an action brought for trespass and judgment given for 40*s.*, could you then bring a separate action for the personal annoyance sustained in respect of the same trespass?]

Yes. In a running-down case resulting in damage to the plaintiff's cab and damage to his person, it was held that there were two separate causes of action, although arising out of the same tort or neglect of the defendant: *Brunsden* v. *Humphrey*. (1) So here the personal annoyance occasioned by the trespass is a separate cause of action.

[COLLINS L.J. That is subject to the question whether it was not an aggravation of the cause of action in respect of the property.]

Hodgson v. *Sidney* (2) may be cited against the plaintiff, but it is distinguishable from the present case. That was an action for a false representation which resulted in a direct pecuniary loss to the plaintiff of 2000*l.*, and the personal annoyance was merely subsidiary. Here the personal annoyance is the principal ground of complaint.

In *Brewer* v. *Dew* (3), an action of trespass, in which the primary cause of action was the personal annoyance to the plaintiff, was held not to pass to the assignees in bankruptcy. That was an action for seizure of goods, and Lord Abinger there intimated that the test was whether the jury could give vindictive damages beyond the value of the goods; and he also suggested that the defendants might have limited their plea so as to make it good by stating that, so far as regards the value of the goods, the plaintiff had lost his right of action by his bankruptcy. Again, in *Howard* v. *Crowther* (4), which was an action for seduction of a servant, the same learned judge said that assignees in bankruptcy were "not entitled to make a profit of a man's wounded feelings," and he held that the right to sue remained in the bankrupt. That principle applies here.

(1) (1884) 14 Q. B. D. 141.
(2) (1866) L. R. 1 Ex. 313; 35 L. J. (Ex.) 182.
(3) (1843) 11 M. & W. 625.
(4) (1841) 8 M. & W. 601.

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Blake Odgers, *K.C.*, and *Spokes*, for the defendants. The cause of action, as appears from the statement of claim itself, is damage to the premises and goods, and the allegation of personal annoyance flows from that. Can it be said that any one of the plaintiff's family could bring an action for personal inconvenience arising from the trespass? Where the cause of action is injury to property, that passes to the trustee in bankruptcy, even though it be alleged that the bankrupt has suffered personal inconvenience, provided that the inconvenience arises out of the cause of action. As the law now stands, the cause of action cannot be split. It is one and indivisible, and it passes to the trustee; it is a "thing in action" within s. 168 of the Bankruptcy Act, 1883. The personal inconvenience to the plaintiff and his family is alleged as a piece of damage arising out of the cause of action previously alleged. The cases cited on behalf of the plaintiff were decided under a totally different bankruptcy law. Under the bankruptcy law in force at the time when *Clark* v. *Calvert* (1) and *Rogers* v. *Spence* (2) were decided a lease did not pass to the bankrupt's assignees unless they elected to take it, and that is the true ground of those decisions; but now the lease passes to the trustee unless he disclaims. The expression "things in action" appears first in the Bankruptcy Act of 1869, and it is repeated in the Act of 1883. Formerly it was only a cause of action by which the estate of the bankrupt was diminished that passed to his assignees. Now the presumption is that everything which the bankrupt has passes to his trustee, the only exception being where the action is of an entirely personal character, e.g., an action for assault. It may be that in such a case the right of action would remain in the bankrupt; though, strictly speaking, "things in action" would include that also. Trespass to lands and trespass to goods go to the trustee in bankruptcy, and the mere fact that personal annoyance has resulted therefrom makes no difference. *Brewer* v. *Dew* (3) is distinguishable because it was there alleged that the trespass was committed under a false allegation of right, whereas in this case no wilful wrong is

(1) 8 Taunt. 742; 21 R. R. 528. (2) 12 Cl. & F. 700.
(3) 11 M. & W. 625.

imputed to the defendants. Further, it is inconsistent with *Hodgson* v. *Sidney* (1), which shews that where, as here, the cause of action is infringement of a right of property, it passes to the assignee, and with it must go any ancillary claim for personal inconvenience to the bankrupt and his family. *Hodgson* v. *Sidney* (1) has since been followed by the majority of the Court in *Morgan* v. *Steble*. (2) In *Brunsden* v. *Humphrey* (3) two distinct rights were infringed. Since the Bankruptcy Act of 1869 the Courts have put a wider interpretation upon what passes to the trustee in bankruptcy: *Wadling* v. *Oliphant* (4); *Emden* v. *Carte* (5); *Metropolitan Bank* v. *Pooley*. (6)

[STIRLING L.J. *Ex parte Vine* (7) shews that the Bankruptcy Act, 1869, did not affect the rule that a cause of action for injury to personal reputation does not pass to the trustee.

COLLINS L.J. The law is so stated in Baldwin on Bankruptcy, 8th ed. p. 292, and Williams on Bankruptcy, 7th ed. p. 200.]

Warren, in reply. The right of action in respect of the invasion of the plaintiff's quiet enjoyment of the property remains in the bankrupt. It is a merely personal right; it would not pass to his legal personal representatives, and it is not assignable: *Hill* v. *Boyle* (8); *Prosser* v. *Edmonds* (9); *Wood* v. *Downes*. (10) For the purpose of maintaining an action of trespass it is immaterial whether there be any actual damage or not. "Every invasion of private property, be it ever so minute, is a trespass": *Entick* v. *Carrington*. (11) In *Ashby* v. *White* (12) it was held that a man who has a right to vote at an election of members of Parliament can maintain an action against the returning officer for refusing to admit his vote, even though the persons for whom he offered to vote were elected.

Cur. adv. vult.

(1) L. R. 1 Ex. 313; 35 L. J. (Ex.) 182.
(2) (1872) L. R. 7 Q. B. 611.
(3) 14 Q. B. D. 141.
(4) (1875) 1 Q. B. D. 145.
(5) (1881) 17 Ch. D. 169, 768.
(6) (1885) 10 App. Cas. 210.
(7) (1878) 8 Ch. D. 364.
(8) (1867) L. R. 4 Eq. 260.
(9) (1835) 1 Y. & C. Ex. 481.
(10) (1811) 18 Ves. 120; 11 R. R. 160.
(11) (1765) 19 State Trials, 1030, 1066.
(12) (1703) 2 Ld. Raym. 938.

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May 23. COLLINS L.J. This case appeared to raise a point of some difficulty, upon which the authorities were not easy to reconcile, and we therefore took time to look into them. The action was for trespass and conversion of the plaintiff's goods, and damages were claimed in addition for the personal annoyance caused thereby to the plaintiff. After the cause was entered for trial the plaintiff became bankrupt, and, on application made to Grantham J. before the jury were sworn, he stayed all proceedings, on the ground that all causes of action were vested in the trustee in the bankruptcy—i.e., the official receiver. From this order the plaintiff appeals.

The general principles which determine whether a cause of action does or does not pass to the trustee in bankruptcy are well settled, and may be stated in the language of Parke B. in *Beckham* v. *Drake* (1): "What then is the proper construction of this section of the Act" (i.e., s. 63 of the Act 6 Geo. 4, c. 16) "according to its words and the several cases decided upon it? The proper and reasonable construction appears to me to be, that the statute transfers not all rights of action which would pass to executors (for rights incapable of being converted into money, such as the next presentation to a void benefice, pass to them), but all such as would be assets in their hands for the payment of debts, and no others—all which could be turned to profit, for such rights of action are personal estate. Of such the executor is assignee in law; and the nature of the office and duty of a bankrupt's assignee requires that he should have them also. But rights of action for torts which would die with the testator, according to the rule 'Actio personalis moritur cum personâ,' and all actions of contract affecting the person only, would not pass. Of such the executor is not assignee in law; and, whatever may be the reason of the law which prohibits him from being so, it seems equally to apply to a bankrupt's assignee." It is admitted in the present case that the damage to the land and goods was merely nominal, and, if substantial damages could be recovered at all, it would be for the annoyance and personal inconvenience caused to the bankrupt, and it was contended, therefore, for

(1) 2 H. L. C. 579, 627.

the plaintiff that the cause of action remained in the bankrupt and did not pass to his trustee. On the other hand, Mr. Odgers contended that the action was one of trespass to the land and conversion of the chattels of the plaintiff, which imported some injury to his estate, the damages for which, even though nominal only, would, therefore, pass to the trustee, and that the annoyance, &c., was not itself a cause of action, but only damage flowing from the original cause of action, which was single and passed to the trustee. This raised a question as to the possibility of dividing a cause of action, and leaving one part to be sued on by the bankrupt and the other by the trustee, and *Brewer* v. *Dew* (1), *Rogers* v. *Spence* (2), and *Hodgson* v. *Sidney* (3), followed by *Morgan* v. *Steble* (4), were cited. It is not, however, necessary, in my opinion, to review these authorities, or to determine the vexed question left undecided by Parke B. in *Beckham* v. *Drake* (5) and Lord Campbell in *Rogers* v. *Spence* (6); for I think this case stands clear of the difficulty which would arise where one and the same cause of action results in substantial damage to the property of the bankrupt as well as injury to his person or annoyance to his feelings. Where the damages to property by trespass and conversion are merely nominal, the cause of action in respect thereof is not regarded as one affecting the value of the property passing to the trustee, so as to give him a right of action in respect thereof, but rather as a wrong personal to the bankrupt himself, which could not found an action by his trustee. This view is well put by Cresswell J. in his opinion delivered to the House of Lords in *Beckham* v. *Drake* (7), summing up the result of *Clark* v. *Calvert* (8), *Rogers* v. *Spence* (2), and *Brewer* v. *Dew*. (1) He says: "In *Clark* v. *Calvert* (8), *Rogers* v. *Spence* (2), and *Brewer* v. *Dew* (1) it was decided that rights of action for trespass to land or goods in the actual possession of a trader do not pass to his assignees if

(1) 11 M. & W. 625.
(2) 13 M. & W. 571; 12 Cl. & F. 700.
(3) L. R. 1 Ex. 313.
(4) L. R. 7 Q. B. 611.
(5) 2 H. L. C. 579, 629.
(6) 12 Cl. & F. 700, 720.
(7) 2 H. L. C. 579, 613.
(8) 8 Taunt. 742; 21 R. R. 528.

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he becomes bankrupt, because those rights of action are given in respect of the immediate and present violation of the possession of the bankrupt, independently of his rights of property, and are an extension of the protection given to his person, and the primary personal injury to the bankrupt is the principal and essential cause of action." Passages to similar effect in different language will be found in the opinions of the other judges. See, in particular, Parke B. (1); Wilde C.J. (2) These opinions are specially valuable coming from judges some of whom had taken part in the cases referred to, and summarising their effect, and they negative the technical ground on which alone Mr. Odgers contends that *Clark* v. *Calvert* (3) and *Rogers* v. *Spence* (4) were decided—namely, that under the then statute the assignees, unless they interfered, took no interest in land let to the bankrupt.

Grantham J. treated the action as one that could not under the circumstances give rise to "vindictive" damages, and therefore as not falling within the test applied by Lord Abinger in *Brewer* v. *Dew* (5) as determining that the right to sue remained in the bankrupt. But the damages claimed here, whether the facts will support the claim or not, are technically vindictive in the sense in which Lord Abinger used the word—that is to say, they are not merely compensation for damage to land or goods, but something more, and, so far as they are more, they are in character vindictive in the legal sense; but, as I have already shewn, even if the damages were nominal only, the cause of action remains in the bankrupt. I am of opinion, therefore, that the action here is one in which, in the words of Cresswell J. above cited, "the primary personal injury to the bankrupt is the principal and essential cause of action," and, though the facts, as far as one can surmise them from the pleadings and materials before Grantham J., make vindictive damages in the popular sense improbable, we should not be justified in interfering with the plaintiff's right to have the stay removed if the cause of action is in point of law vested in

(1) 2 H. L. C. 626.
(2) 2 H. L. C. 634.
(3) 8 Taunt. 742; 21 R. R. 528.
(4) 13 M. & W. 571; 12 Cl. & F. 700.
(5) 11 M. & W. 625.

him notwithstanding his bankruptcy. I think the appeal must be allowed.

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STIRLING L.J. I am of the same opinion. I also desire to rely on the very clear expression of opinion of Cresswell J. in the case which has been referred to as to the earlier cases which were the foundation of the argument on behalf of the appellant in this case. I should desire to add only one word with reference to the question whether there has been any such change in the bankruptcy law since the time when those cases were decided as to alter the rights of the bankrupt and his trustee.

Now, it is quite true that the language of the present Act is different from that which was in force at the time when those cases were decided. Still, even under the general words which were found in the old bankruptcy statutes, such, for example, as "goods and chattels," it was held so long ago as the well-known case of *Ryall* v. *Rowles* (1) by Lord Hardwicke that choses in action were included. In the present Bankruptcy Act, s. 168, there is found a definition of "property," which is the word used in the body of the Act, and it is defined to include money, goods, things in action, land, and every description of property, whether real or personal, and also a number of other things which I need not mention. That change in the language of the Legislature was first introduced in the Bankruptcy Act of 1869, and it was pointed out very properly that under this Act things in action are specifically referred to, though they were not in the previous Bankruptcy Acts. Upon that it seems to me there is a direct authority which shews that nevertheless the state of the law as determined by the earlier cases to which I have referred still remains in force. That is the case of *Ex parte Vine* (2), where it was held by the Court of Appeal that under the Bankruptcy Act of 1869, as before it, damages in an action for personal tort recovered by an undischarged bankrupt do not pass to the trustee. The language of the Act of 1883 is in this respect indistinguishable from that of the Act of 1869, and

(1) (1749) 1 Ves. Sen. 348. (2) 8 Ch. D. 364.

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it seems to me that *Ex parte Vine* (1) is an authority which guides us in this present case. I therefore arrive at the same conclusion as the Lord Justice.

Appeal allowed.

Solicitors: *Farlow & Fuller; Ellis, Munday & Clarke.*

H. B. H.

1901 *June* 11.

Ex parte BURNBY.

Criminal Law—Practice—Conviction—Continuing Offence—Averment of Commission of Offence on several Discontinuous Days.

An information charged the defendant, a licensed victualler, with permitting his house to be used as a brothel on the 26th, 28th, 29th, and 31st days of January, and the 1st, 4th, 5th, and 6th days of February in the same year, contrary to s. 15 of the Licensing Act, 1872:—

Held, that the fact of the days named being non-consecutive did not prevent the charge from being a charge of one continuing offence; that the information was consequently not bad for duplicity; and that the defendant might on such an information be lawfully convicted of so permitting his house to be used on all the days named.

MOTION FOR CERTIORARI.

James Burnby, a licensed victualler, was summoned before the justices of the peace for the borough of Colchester, upon an information charging that he "on the 26th, 28th, 29th, and 31st days of January, and the 1st, 4th, 5th, and 6th days of February, 1901, at the parish of Colchester within the borough aforesaid, there being duly licensed to sell by retail intoxicating liquors in his house and premises known by the sign of the Royal Oak there situate, unlawfully did permit his house and premises to be used as a brothel, contrary to s. 15 of the Licensing Act, 1872." The defendant's solicitor at the hearing took the objection that the information was bad for duplicity, on the ground that it alleged the commission of eight separate offences, and he asked that the prosecutor should elect upon which of the eight charges he would proceed. The justices overruled the objection and proceeded with the hearing, and convicted the defendant, in the terms of the information, of

(1) 8 Ch. D. 364.

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having on the said eight days permitted his house to be used as a brothel. The defendant moved ex parte for a rule for a certiorari to bring the said conviction up to be quashed.

C. E. Jones, for the defendant. The conviction is bad as alleging the commission of the offence on eight separate and discontinuous days. Such a conviction is in contravention of s. 10 of the Summary Jurisdiction Act, 1848, which provides that every information "shall be for one offence only, and not for two or more offences." The justices should have amended the information.

[BIGHAM J. Does the information here state more than one offence? Is not the keeping of a brothel on divers days one continuous offence?]

Not where the days are not consecutive.

[RIDLEY J. In *Onley* v. *Gee* (1), where an information charged the defendant with keeping a house as a betting-house on October 5, and on divers other days between the said October 5 and November 16, the date of laying the information, it was held that a conviction for so keeping the house on November 8 was good.]

There, although there were several days charged in the information, the defendant was convicted only in respect of one. It may be that here the justices might have properly convicted Burnby in respect of any one of the eight days, but they have convicted him in respect of all.

RIDLEY J. I think that there is no foundation for this application. If this had been a charge of the commission of a separate offence on each of the days named in the information, no doubt the information and conviction would have been bad. But here the charge is of but one continuing offence. The rule must be refused.

BIGHAM J. I agree.

Rule for certiorari refused.

Solicitors for applicant: *Jones & Son, Colchester.*

(1) (1861) 30 L. J. (M.C.) 222.

J. F. C.

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April 23, 24, 25; *May* 13.

[IN THE COURT OF APPEAL.]

EADY *v.* ELSDON.

Practice—Costs—Taxation—Guardian ad litem—Official Solicitor—Solicitor and Client or Party and Party Taxation—Rules of Supreme Court, Order LXV., *r.* 13.

An action for a tort having been brought against an infant, no appearance was entered for him, and on the plaintiff's application the official solicitor was assigned guardian ad litem to the defendant, and he delivered a defence on behalf of the defendant. At the trial the issues were found by the jury in favour of the plaintiff with 450*l.* damages, and judgment was entered for him accordingly; and it was ordered that the plaintiff should pay the costs of the official solicitor, as guardian ad litem of the defendant, to be taxed by the master:—

Held, that there being in the order no special direction to the contrary, rule 13 of Order LXV. did not apply, and the costs must be taxed as between party and party.

Decision of Grantham J. reversed.

APPEAL against an order of Grantham J. directing that the costs of the official solicitor, as guardian ad litem of an infant defendant, should be taxed as between solicitor and client.

The action was brought by a schoolmaster against one of his pupils (an infant), claiming damages for the defendant's wrongful act in setting fire to the plaintiff's house and furniture. The writ was served on the defendant's father, but no appearance was entered by him on behalf of the defendant. On the application of the plaintiff the official solicitor was assigned as the defendant's guardian ad litem, and he delivered a defence on behalf of the defendant. The principal defences raised were —(1.) that the defendant at the time when he did the alleged wrongful act was of unsound mind, and not legally responsible for the consequences of his acts; (2.) that the plaintiff, when he took the defendant as his pupil, was aware of his condition of mind, and voluntarily took him as his pupil for reward upon a bargain that he would exercise special control and supervision over him, and that he failed to do this. At the trial the jury found that the defendant was not of unsound mind when he set

fire to the house, and that it was not part of the bargain with the plaintiff that he should be responsible for and take the risk of such an act, and they awarded the plaintiff 450*l.* damages. Judgment was entered accordingly, and it was ordered that the plaintiff should pay the costs of the guardian ad litem, to be taxed by the master, and the plaintiff was to be at liberty to add what he should so pay to his own costs of the action.

It was also ordered that the taxing master should certify what (if anything) was due to or from the official solicitor in respect of his costs, after giving credit for the sum of 175*l.* paid to him by the plaintiff on account thereof, the plaintiff to pay to the official solicitor, or receive from him, the amount so found due by the master within sixty days after the date of the allocatur.

The order, which appeared to be in the usual form in such cases, did not say whether the costs of the official solicitor were to be taxed as between party and party or as between solicitor and client.

Upon the taxation the master held that the costs of the official solicitor must be taxed on the party and party scale, and he disallowed altogether the costs of some witnesses to prove the issue of the defendant's unsoundness of mind, on the ground that the official solicitor had failed upon that issue. The official solicitor carried in objections to the taxation (1.) on the ground that, by reason of the peculiar position of the official solicitor when appointed guardian ad litem of an infant defendant at the instance of the plaintiff, he was entitled to a complete indemnity by having his costs allowed as between solicitor and client; (2.) that at any rate the official solicitor ought to be allowed the costs (which had been disallowed) of witnesses called to prove the defendant's state of mind.

The master said as to (1.): "This may be so, but it can only be done by direction of the judge. The master taxing has no authority to tax otherwise than between party and party." And as to (2.) the master said: "As to the witnesses which it is said by this objection I ought to have allowed, I can only regard these witnesses as called substantially in support of the fifth plea" (i.e., the plea of insanity) "which was found against

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the defendant, and even if it had been found for him it would have been immaterial."

On appeal to Grantham J. the learned judge directed that the objections of the official solicitor to the taxation should be allowed, and referred it back to the master to vary his certificate accordingly.

The plaintiff (by the leave of the Court) appealed.

April 23. *M. M. Macnaghten*, for the plaintiff. It has been the practice of the Court from the earliest times, when an infant has been sued, to appoint one of its officers his guardian ad litem. At one time the Court appointed one of the Six Clerks to act, and upon their abolition in 1842 the Court of Chancery was empowered, by Order XXVIII. of the Chancery Orders of October 26, 1842—which is set out in Sanders' Chancery Orders, vol. ii. p. 924—to appoint one of its solicitors. That order was re-enacted by the Consolidated Orders of 1845, and the present order, Rules of the Supreme Court, Order LXV., r. 13, is practically identical with it. (1) The first reported case under the old Order XXVIII. is *Robinson* v. *Aston* (2), in which was cited an unreported case of *Robey* v. *Whitewood*, heard on March 13, 1845, where, a solicitor having been appointed guardian ad litem of an infant defendant, the plaintiff was ordered to pay the costs of the guardian ad litem and add them to his own. The practice was to appoint the solicitor as guardian ad litem only, and not to act as the infant's solicitor. And so under the present rule, the Court can appoint one of its solicitors as guardian ad litem, but usually it appoints the official solicitor, and as guardian simply, not as the infant's solicitor. That was the course adopted in

(1) By Order LXV., r. 13, "Where the Court or a judge appoints one of the solicitors of the Court to be guardian ad litem of an infant or person of unsound mind, the Court or judge may direct that the costs to be incurred in the performance of the duties of such office shall be borne and paid either by the parties or some one or more of the parties to the cause or matter in which such appointment is made, or out of any fund in court in which such infant or person of unsound mind may be interested, and may give directions for the repayment or allowance of such costs as the justice and circumstances of the case may require."

(2) (1845) 9 Jur. (O.S.) 224.

the present case, and the judgment was framed in the recognised form, directing the plaintiff to pay the "costs" of the guardian ad litem, with leave to add them to his own. It is the well-settled rule that where costs are directed to be taxed simply, without any further direction, they will be taxed as between party and party; and that if they are intended to be taxed as between solicitor and client, the order must contain an express direction to that effect: Morgan and Wurtzburg on Costs, 2nd ed. p. 4; 1 Seton on Decrees, 5th ed. p. 220; 1 Smith's Chancery Practice, 7th ed. pp. 1082–3. This rule of taxation is universally recognised in both the Chancery and King's Bench Divisions; and in fact the taxing masters have no power or authority in such cases to tax on any other scale.

[STIRLING L.J. Do you say that the Court has not been in the habit of giving the official solicitor the costs of performing the duties of his office?]

That is so: all the Court does is to give him "his costs of the action," that is, party and party costs only, but not profit costs; though it has jurisdiction to give solicitor and client costs if it thinks proper. The costs of all proceedings are now in the discretion of the Court, and the Court has "full power to determine by whom and to what extent such costs are to be paid": Supreme Court of Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5.

Montague Lush, for the official solicitor. The practice for thirty years past has been for the official solicitor, when appointed guardian ad litem, to act himself as solicitor, and to charge for business done by him as solicitor. The official solicitor was appointed guardian ad litem of the infant defendant at the instance and for the benefit of the plaintiff. He had no choice in the matter, but was compelled to undertake the office. Under such circumstances the official solicitor may have to take advice as to whether the action is maintainable. The costs of such advice would not be allowed on a party and party taxation, and it is submitted that the official solicitor ought not to bear them himself.

[COLLINS L.J. It may be very proper that the official solicitor should be fully indemnified against costs; but the

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question is, whether under an order in this form the costs can be taxed otherwise than as between party and party.

STIRLING L.J. We have made inquiries of the taxing masters in the Chancery Division, and they say that under such an order the practice in that Division is to tax as between party and party.]

In the present case it is the costs of the unsuccessful party to the action which are to be taxed; in ordinary cases the taxation is of the costs of the successful party. The basis of a party and party taxation is that the unsuccessful party has no costs. On the principle adopted by the master, the official solicitor would be deprived of costs altogether.

[STIRLING L.J. The order is that the official solicitor is to have the costs of his defence. The question is on what scale are the costs to be taxed.]

The order that the costs of the guardian ad litem should be paid could not have meant his costs as between party and party; that would have been nonsense, for between party and party he, being unsuccessful, would have been entitled to no costs. The ordinary rule that a party is not entitled to any costs of the issues on which he has failed cannot apply here. When the official solicitor is thrust into a case in this way he ought to be fully indemnified against costs.

[STIRLING L.J. Under rule 13 of Order LXV. of the Rules of the Supreme Court I think the Court has power to direct that the costs should be taxed as between solicitor and client. But has it done so in the present case? It would seem that according to the practice in the Chancery Division it has always been considered that an order in this form gives costs only as between party and party.]

There is no reported decision on the point, and this Court must determine for the first time what the meaning of the order is. In *Emmanuel* v. *Kirk* (1) the official solicitor, as guardian ad litem, defended the action on behalf of a defendant who was of unsound mind. The official solicitor desired to withdraw the defence, and Field J. ordered that it should be withdrawn, and that the plaintiff should be at liberty to sign

(1) (1885) 29 Sol. J. 258.

final judgment for the amount claimed as for default of defence, with costs to be taxed, and that the plaintiff should pay to the guardian ad litem his taxed costs of the action and of the application, with liberty for the plaintiff to add those costs to his own.

The ground of that decision must have been that the plaintiff ought to indemnify the official solicitor against costs. Suppose that, after taking advice, he withdrew the defence of the infant, and put in a different one, why should he pay the costs of doing his duty? The real question is, What is the true measure of the costs to be allowed to a guardian ad litem? According to the information of the official solicitor, it has been the practice for at least thirty years to tax his costs in such cases as between solicitor and client. He has in his possession orders made in other cases similar in form to the present order, under which items were allowed on taxation which would not have been allowed on a party and party taxation. The present order does not in any way fetter the Court; it simply gives costs, but it should be understood as meaning all the costs incurred by the official solicitor in the performance of the duties of his office as guardian ad litem. The official solicitor is neither a party to the action nor a client, and, therefore, the order simply directs the payment of his costs. The basis of the taxation ought to be that which would give him a complete indemnity. In this very action Lord Russell C.J. ordered the plaintiff to make payments on account of the official solicitor's costs.

M. M. Macnaghten, in reply. In *Emmanuel* v. *Kirk* (1) the point was treated as open to discussion, and not as one in which the practice was settled.

[COLLINS L.J. That case goes rather to the question what order the judge ought to make than to the construction of the order when made.]

In the unreported cases which have been referred to, the orders under which the taxation took place have not been produced. The opinion of the taxing masters of the Chancery Division is of great weight. The true meaning of the order is

(1) 29 Sol. J. 258.

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that the official solicitor is to have those party and party costs which he would have had if he had been a successful defendant. In *Harris* v. *Petherick* (1) it was held by the Court of Appeal that the Court had, under the Rules of the Supreme Court, Order LV., power to order a plaintiff who had claimed 85*l.* for commission and 6*s.*, the cost of an advertisement, and had recovered only the 6*s.*, to pay the costs of the defendant.

Cur. adv. vult.

May 13. COLLINS L.J., after stating the nature of the action, continued:—At the trial of the action the learned judge put two questions to the jury: "(1.) Was the boy deranged and out of his mind when he set fire to the plaintiff's house? (2.) Was it part of the bargain on which the plaintiff took the boy that he should be responsible for such an act as this was, and undertake the risk of it?" The jury answered both questions in the negative, and they awarded the plaintiff 450*l.* damages.

Then came the question of the costs of the guardian ad litem, and the learned judge ordered "that the plaintiff do pay the costs of the official solicitor, the guardian ad litem of the defendant, and that the question of such costs be referred to one of the masters to tax the same and certify the amount thereof." [The Lord Justice read rule 13 of Order LXV., and continued:—]

That rule would, as it seems to me, clearly entitle the judge to fix any particular standard which he might think just as that by which the costs payable to the guardian ad litem should be adjusted. In the present case the judge has not fixed any standard; he has simply referred the question of these costs to the master to tax the same and certify the amount thereof. When the matter came before the master, the official solicitor claimed to be entitled to costs as between solicitor and client. The master taxed them on what he called the party and party scale, and found as to a particular issue, namely, the issue of the boy's lunacy, against the guardian ad litem, allowing

(1) (1879) 4 Q. B. D. 611.

him costs only on the footing that he was really a party to the action, and a defeated party.

The official solicitor carried in two objections to the taxation: (1.) that he as guardian ad litem was, under the order at the trial and under rule 13 of Order LXV., entitled to costs as between solicitor and client; (2.) that the master was wrong in giving him the costs of the issue on which he had failed only on the footing of his being a defeated party. Grantham J. referred it back to the master to review his taxation with a view to his allowing the costs as between solicitor and client. So far as appears, the second question raised as to the costs of the particular issue was not discussed before the learned judge.

On the appeal to us Mr. Macnaghten contended that, when a judge has made an order for the payment of the costs of a guardian ad litem without giving any special indication of the scale to be applied in assessing the costs, the rule of practice is that the standard known as party and party costs shall be applied, and not that which is called solicitor and client costs. In my opinion Mr. Macnaghten is right. We took time to consider this matter in order that we might inquire into the practice of the masters, because in a question of this kind it is exceedingly important that a well-ascertained practice, if it exists, should be followed. There is nothing more dangerous than to interfere incautiously with matters of practice. We have had the opportunity of consulting most experienced masters of both the Chancery and the King's Bench Divisions, and they tell us that the uniform practice has been, in the absence of a special direction to allow solicitor and client costs, to tax the costs of a guardian ad litem on the party and party footing, and, though strictly speaking that standard cannot be logically applied in such a case, inasmuch as a guardian ad litem is not a "party," yet in practice what is meant by party and party costs in such a case is, that the costs payable by the plaintiff to the guardian ad litem are those costs to which the guardian ad litem would on taxation be entitled against the plaintiff, assuming him to be a successful party in a litigation with the plaintiff. This decides the first point on the appeal.

Then comes the second point, as to the costs of one issue on

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which the defendant has failed. The master has treated the guardian ad litem as a real party who has failed, and has assessed his costs on that footing. That would probably be right on a true party and party taxation, but it is, I think, wrong on the hypothesis by which the costs of the guardian ad litem are to be ascertained. He is to be treated as if he were a successful party. That is the standard, as I understand it, and it is the standard which is applied in both the Chancery and the King's Bench Divisions.

The result is that the appeal succeeds in part and fails in part, and therefore I think it should be allowed without costs. I think, also, that no costs should be given of the hearing in the Court below.

STIRLING L.J. Two points are raised—(1.) that the costs ought to be taxed as between solicitor and client; (2.) that the costs of one issue on which the defendant failed, which have been disallowed by the taxing master, ought to be allowed.

As regards the first question, whether the costs are to be taxed as between solicitor and client, in my opinion, having regard to the uniform practice which has existed in the Court of Chancery and the Chancery Division apparently ever since the year 1842, when a rule similar to rule 13 of Order LXV. was first introduced (being afterwards adopted in the Consolidated Orders of the Court of Chancery, and again in the rules under the Judicature Act), costs can only be allowed as between party and party in the absence of a special direction to the contrary. This is in accordance with the universal rule as to the construction of taxation orders, and, if in any case the official solicitor considers that there are circumstances which entitle him to solicitor and client costs, he ought to call the attention of the judge to those circumstances, and ask him to make an order under rule 13 expressly authorizing the taxing master to allow the costs as between solicitor and client.

As regards the other point, the master has given two reasons for the disallowance of the costs of the issue of the defendant's unsoundness of mind—(1.) that the issue was found against the defendant; and (2.) that, even if it had been found in his

favour, it would have been immaterial. As to the first reason, in fact both issues were found against the defendant, and if that principle were applied strictly the guardian ad litem would recover no costs at all under this order. I cannot, therefore, agree with the master as to that.

As regards the other reason, that even if the issue had been found in the defendant's favour it would not be material, it must be borne in mind that at the trial the learned judge put the issue to the jury. This, it seems to me, clearly implies an opinion on his part that, if the issue had been found in favour of the defendant, there would have been something to discuss. He must have thought that the issue was one which if it had been found the other way would not have been entirely irrelevant. Having that in his mind, the learned judge directed the costs of the official solicitor to be paid by the plaintiff, and, that being so, I cannot see that the master had any right to deprive the official solicitor of the costs of either of the issues on which the defendant failed, and I say that fully remembering the power which is conferred on the taxing master by rule 27 (20) of Order LXV. I do not think that the disallowance of these costs is justified by that rule. On this point, therefore, the appeal fails.

Appeal allowed in part.

Solicitors: *A. W. Mills; The Official Solicitor.*

W. L. C.

1901
June 4.

STODDART *v.* ARGUS PRINTING COMPANY.

Gaming—House used for Betting—Advertisement of—Betting Act, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 7—*Betting Act*, 1874 (37 & 38 *Vict. c.* 15), *s.* 3.

The plaintiff was the occupier of an office situate in Holland, and also the proprietor of a newspaper published weekly in London. Each number of the newspaper contained a notice of what was called a "coupon competition"—that is to say, of a promise by the plaintiff to pay a certain specified sum of money to such persons as should correctly guess the result of a certain horse-race then shortly about to be run, and should write their guesses upon certain forms called "coupons" which were issued with each number of the newspaper, and should send the coupons so filled up to the plaintiff's office in Holland, together with the sum of one penny in respect of each guess made. The defendants, who had made a contract with the plaintiff to publish the said newspaper on his behalf, refused to perform their contract upon the ground that the publication of the newspaper was illegal as being an infringement of s. 7 of the Betting Act, 1853, and of s. 3 of the Betting Act, 1874:—

Held, that, whether the fact of the plaintiff's office being situate out of the jurisdiction was sufficient to prevent the business so carried on by the plaintiff from constituting an offence against the Betting Acts or not, there was nothing in the above-mentioned sections to render illegal the publication by the defendants of the newspaper advertising the said business.

POINT of law raised upon pleadings.

Statement of claim:—

1. The plaintiff is and has since the beginning of the year 1890 been carrying on business as the proprietor of a newspaper called *Sporting Luck*.

2. By an agreement dated March 20, 1890, the defendants agreed with the plaintiff to print and publish *Sporting Luck* on his behalf every week on terms and conditions in the said agreement more particularly specified.

3. The defendants have recently, while the said agreement was still in force, without any justification and in violation of the said agreement, refused to print and publish *Sporting Luck* for the plaintiff, whereby the plaintiff has suffered damage.

Defence:—

1. The defendants have always been and still are ready and

willing to fulfil their said contract so far as they legally may, and to print the said newspaper. It was a condition of the said agreement that the defendants were only to be called upon to fulfil it if the said newspaper contained matter which was neither libellous nor illegal.

2. The defendants only refused to print the said newspaper because the plaintiff called upon them under the contract, which is above referred to, to print and publish for circulation in England with the said newspaper, and as a part of it, an advertisement headed "International Supplement" relating to a horse-racing competition, the publication of which, according to the defendants' contention, constitutes an offence against the Betting Act, 1853, s. 7, and the Betting Act, 1874, s. 3. (1)

(1) By s. 1 of the Betting Act, 1853, "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as and for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race."

By s. 7, "Any person exhibiting, or publishing, or causing to be exhibited or published any placard, handbill card, writing, sign, or advertisement whereby it shall be made to appear that any house, office, room, or place is opened, kept, or used for the purpose of making bets or wagers in manner aforesaid, or for the purpose of exhibiting lists for betting, or with intent to induce any person to resort to such house, office, room, or place for the purpose of making bets or wagers in manner aforesaid, or any person who on behalf of the owner or occupier of any such house, office, room, or place, or person using the same, shall invite other persons to resort thereto for the purpose of making bets or wagers in manner aforesaid," shall be guilty of an offence.

By s. 3 of the Betting Act, 1874, "Where any letter, circular, telegram, placard, handbill, card, or advertisement is sent, exhibited, or published—

"(1.) Whereby it is made to appear that any person, either in the United Kingdom or elsewhere, will on application give information or advice for the purpose of or with respect to any such bet or wager, or any such event or contingency as is mentioned in the principal Act, or will make on behalf of any other person any such bet or wager as is

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Particulars :—

I. On October 30, 1900, Ada Jane Stoddart was tried and convicted at the Central Criminal Court for that she, being the occupier of an office, 10, Red Lion Court, in the City of London, had unlawfully opened, kept, or used that office for the purpose of money being there received by her as the consideration of an undertaking to pay thereafter money on events relating to horse-racing, in contravention of s. 1 of the Betting Act, 1853.

II. The judge at the trial of the said Ada Jane Stoddart reserved the point, and stated a case for the consideration of the Court for Crown Cases Reserved, as to whether the then defendant had in law been guilty of any offence against the said section; and on November 17, 1900, the conviction of the said Ada Jane Stoddart was unanimously affirmed by the Court for Crown Cases Reserved. (1)

The facts that were proved against the said Ada Jane Stoddart, and upon which her conviction was founded, were that she was the occupier of an office at 10, Red Lion Court, in the City of London, and the registered proprietor of a newspaper published weekly at that office. Each number of the paper contained a notice of what was called a "coupon competition"—that is to say, of a promise by the defendant to pay a certain specified sum of money to such persons as should correctly guess the result of a certain horse-race then shortly about to be run, and should write their guesses upon certain forms called "coupons," which were issued with each number

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mentioned in the principal Act; or

"(2.) With intent to induce any person to apply to any house, office, room, or place, or to any person with the view of obtaining information or advice for the purpose of any such bet or wager, or with respect to any such event or contingency as is mentioned in the principal Act; or

"(3.) Inviting any person to make or take any share in or in connection with any such bet or wager;

"Every person sending, exhibiting, or publishing, or causing the same to be sent, exhibited, or published, shall be subject to the penalties provided in the seventh section of the principal Act with respect to offences under that section."

(1) [1901] 1 K. B. 177.

of the newspaper, and should return the coupons so filled up to the then defendant's office together with the sum of one penny in respect of each guess made. A large number of persons every week sent in to the said office coupons filled up as aforesaid accompanied by remittances of money.

III. Between the date of the said decision of the Court for Crown Cases Reserved affirming the said conviction and the date of the issue of the writ in this action the plaintiff instructed the defendant, under the agreement referred to in paragraph 1 of this defence, to publish the advertisement called "An International Supplement," containing a number of coupons, as part of the newspaper called *Sporting Luck*, in which was advertised to the English public a system of competition identical in all respects with that in regard to which the said Ada Jane Stoddart had been convicted, except that the competitors were no longer to send their moneys or deposits to No. 10, Red Lion Court, in the City of London, or to any place of receipt or deposit within the jurisdiction of the English Courts, but were to send all money to, and it was expressly announced that in the future moneys would only be received at, an office which had been opened by the plaintiff for the purpose of receiving them at Middelburg, in the kingdom of Holland.

IV. The defendants refused to print the said advertisement, contending that as the said office in Middelburg, in Holland, had been opened by the plaintiff for a purpose which would infringe s. 1 of the Betting Act, 1853, and s. 3 of the Betting Act, 1874, if it had been so opened in this country, the publication of an advertisement in relation to such an office was illegal under the specified sections of the two Acts of Parliament above set forth, which refusal constitutes the breach alleged in the statement of claim.

Lord Coleridge, K.C., and *Stutfield*, for the plaintiff. The publication of the advertisement in question is not illegal. The object of the Act of 1853 was to prohibit, not betting, but the keeping of houses or places for the purposes of betting, and the advertisements prohibited by s. 7 of that Act were the

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advertisements of houses, &c., kept in contravention of the Act. To bring a case within the Act there must be a keeping of a prohibited house or place within the jurisdiction. It can never have been intended by Parliament to extend the prohibition to houses situate abroad. It would have been contrary to the comity of nations to do so. Sect. 20 provides that this Act shall not even extend to Scotland, and, though it has since been extended to that country by s. 4 of the Act of 1874, the extension has been carried no farther. Moreover, ss. 11 and 12 of the Act of 1853 give power to the justices and to the police to authorize the search of suspected houses, which obviously could have no application to betting-houses situate abroad. In the case of foreign lotteries there is express statutory prohibition against the advertisement of them, even though they may not be illegal themselves, but there is no corresponding express prohibition of the advertisement of foreign betting-houses. Secondly, even if the advertisement of a foreign betting-house is to be treated as on the same footing as the advertisement of a betting-house in this country, still the advertisement in this case does not fall either within s. 7 of the Act of 1853, or s. 3 of the Act of 1874. Sect. 7 of the former Act only prohibits the advertising of houses, &c., kept for the purposes of making bets "in manner aforesaid"—that is to say, in the manner pointed out in s. 1, "with persons resorting thereto." And it has been held that to bring premises within those words they must be kept for the purpose of betting with persons physically resorting thereto: *Reg.* v. *Brown.* (1) But there could be no suggestion of any physical resorting in the present case. The persons betting were to send their money through the post. Therefore s. 7 has no application. For even if the house in Holland was kept in contravention of the second part of s. 1, i.e., for the purpose of money being received as the consideration for a promise to pay thereafter money on an event relating to a horse-race, s. 7 does not prohibit the advertisement of a house kept for that purpose. Nor has s. 3 of the Act of 1874 any application to the present case. The greater part of that section relates to advertisements of sources

(1) [1895] 1 Q. B. 119.

of information and advice with respect to betting, and that is not the kind of advertisement which the defendants are asked to publish. It may be that the plaintiff's business amounts to an inviting of persons to make bets or wagers, as was suggested by Wills J. in *Reg.* v. *Stoddart* (1), but still the advertisement of such a business does not fall within sub-s. 3 of s. 3, for the section is confined to bets of the kind mentioned in the principal Act, i.e., the Act of 1853, which, as already pointed out, are bets or wagers made with persons physically resorting to the betting-house.

Charles Mathews, for the defendants. The plaintiff's advertisement is an offence against s. 7 of the Act of 1853. The language of that section is perfectly general: it applies to advertisements of any house used for the purpose of betting. It is not confined to houses used for that purpose in this country. The case is also within s. 3 of the Act of 1874, which expressly applies to houses outside the United Kingdom.

PHILLIMORE J. In this case we are of opinion that there should be judgment for the plaintiff upon what is possibly a somewhat narrow ground. Sect. 1 of the Betting Act, 1853, deals with two distinct offences. The first is that of keeping a house for the purpose of "betting with persons resorting thereto"; and the decision of the Court for Crown Cases Reserved in *Reg.* v. *Brown* (2) establishes that the word "resorting" means physically resorting. But that is not the offence which it is suggested that the plaintiff is committing in carrying on his business in the way he does. The offence which it is suggested he is committing is the second offence created by the section, which consists in keeping a house for the purpose of money being received as and for the consideration for an undertaking to pay money on an event or contingency relating to a horse-race. It was of that latter offence that Mrs. Stoddart was convicted; and the business which formed the subject of her conviction was precisely the same in all respects as the business which the plaintiff is now carrying on, except that the plaintiff's house of business is

(1) [1901] 1 K. B. 177, at p. 185. (2) [1895] 1 Q. B. 119.

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situate outside the jurisdiction and not within the United Kingdom, as was the case with that of Mrs. Stoddart. It has been argued that the place where the plaintiff carries on his business makes all the difference; but, speaking for myself, I do not think it necessary to decide that point. If the plaintiff's business had been carried on within the jurisdiction, I still fail to see that the act of the defendant in advertising that business would have constituted any offence against either the Betting Act, 1853, or the Betting Act, 1874. The section of the former Act which deals with the subject of advertising betting-houses is s. 7; and when one comes to examine that section carefully it seems clear that it is directed only against advertisements of houses kept for the purpose mentioned in the first part of s. 1—that is to say, for the purpose of betting with persons physically resorting thereto, and is not directed against advertisements of houses kept for the purposes mentioned in the second part of s. 1. Therefore, there is nothing in s. 7 of the Act of 1853 to make the publication of the plaintiff's newspaper in the present case illegal. Then we come to s. 3 of the Act of 1874. The 1st sub-section of that section relates to advertisements of persons who will on application give information or advice with respect to any such bets or wagers as are mentioned in the Act of 1853, or will make on behalf of any other person any such bets or wagers as are mentioned in that Act. The 2nd sub-section relates only to advertisements of houses where information or advice with respect to such bets or wagers may be obtained; while sub-s. 3 deals with advertisements inviting persons to make any such bet or wager. Sub-s. 2, then, and the first portion of sub-s. 1, are confined to advertisements of persons from whom, or places where, information or advice with respect to betting may be obtained; and that is not this case. Sub-s. 3 and the second part of sub-s. 1, indeed, go further, inasmuch as they deal with advertisements of persons who are willing to make bets; but they are both qualified in this important particular, that the bets to which they refer are "such bet or wager as is mentioned in the principal Act." That takes us back to s. 1 of the Act of 1853, and the only kind of bets there dealt with

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are bets made with persons physically resorting to the betting-house. Therefore, neither has s. 3 of the Act of 1874 any application to the facts of the present case. There seems to me to be nothing illegal in the publication of the newspaper in question, and there is consequently no excuse for the defendants' refusal to perform their contract. There must be judgment for the plaintiff.

BRUCE J. I am of the same opinion and for the same reasons.

Judgment for the plaintiff.

Solicitors for plaintiff: *Le Brasseur & Oakley.*
Solicitors for defendants: *Lewis & Lewis.*

J. F. C.

In re THE GWAWR-Y-GWEITHYR INDUSTRIAL AND PROVIDENT SOCIETY, LIMITED. DOVEY *v.* MORGAN.

1901
April 23;
May 14.

Industrial and Provident Society—Winding-up—Powers of Committee—Lien on Shares—Set-off against Debts due from Member—Creditor—Fraudulent Preference—Industrial and Provident Societies Act, 1893 (56 & 57 *Vict. c.* 39), *s.* 23, *sub-s.* 2—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 164.

By the rules of a co-operative society for supplying goods to its members, which was registered under the Industrial and Provident Societies Act, 1893, each member was required to hold a certain number of shares in the society, and was at liberty to withdraw his share capital under certain conditions upon giving notice to the manager. The appellant, a member of the society, being unable owing to a strike to pay for goods supplied to him, the managing committee on four occasions debited the amount standing to his credit as a shareholder with sums due from him to the society for goods, the total amount so debited being about equal to the amount of his share capital; no notice under the rules to withdraw his capital had been given by the appellant. The society was in financial difficulties, and was at the date of the last two transactions hopelessly insolvent to the knowledge of the managing committee; but the committee, who had adopted the same course with other shareholders, acted bonâ fide and without intent to prefer any particular shareholder. Upon a summons taken out by the liquidator of the society to set aside the transactions:—

Held, that the transactions were not to be treated as withdrawals of

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capital by the appellant, but were valid under s. 23, sub-s. 2, of the Industrial and Provident Societies Act, 1893, which gives to a society registered under the Act a lien upon the shares of a member and a right to set off any sum credited to a member upon his shares towards the payment of any debt due from him to the society:

Held, further, that the last transaction, although within three months of the passing of a resolution for winding up the society, was not void under s. 164 of the Companies Act, 1862, as an undue or fraudulent preference of a creditor, the appellant not being a creditor of the society within the meaning of that section.

APPEAL from the judge of the Glamorganshire County Court. The following statement of facts is taken from the written judgment of the Court:—

This was an appeal from the decision of the learned county court judge of the Glamorganshire County Court upon a summons taken out by the liquidator of the Hope of the Workmen's Industrial Provident Society at Aberdare to set aside certain transactions whereby four amounts were purported to be refunded to Richard Morgan in respect of his shares in the society. The following were the dates and amounts of the transfers or refundings impeached:—

		£	*s.*	*d.*
1898.	February 21 . . .	4	19	0
,,	June 30	20	0	0
,,	July 20	12	8	3
,,	November 25 . . .	14	10	11
		51	18	2

The society had been established for many years under the Industrial and Provident Societies Act, 1876, and was in the nature of a co-operative society supplying goods to the members. The capital was in shares of 1*l.*, and it was provided by the rules that each member must hold at least five shares. By rule 16 provision was made that members might withdraw their capital at certain rates, and on certain terms, on giving notice to the manager. Early in the year 1898 the society was in financial difficulties, and it was found by the learned county court judge that by July 14, 1898, the society was to the knowledge of the managing committee hopelessly

insolvent. In February, 1898, before the first of the refundings above referred to, the amount of capital held by Morgan in the society was 54*l.* 19*s.* This amount appears to have been 4*l.* 19*s.* in excess of the maximum allowed by the rules to be held by a member; but this does not appear to be material. From time to time during the year 1898 Morgan was being supplied with goods, and it appears that owing to the strike and labour difficulties which were existing at the time he, in common with many other members of the society, was unable to pay cash for the goods supplied to him, it being provided by rule 12 that as far as possible the goods of the society were to be sold for ready money, and that in no case should credit be given to members for more than two weeks. In consequence of this state of things the committee of management on February 21 debited the amount standing to Morgan's credit as shareholder with a sum of 4*l.* 19*s.*, he at the same time paying 2*l.* 10*s.* cash, making a total of 7*l.* 9*s.* on account of 7*l.* 18*s.* 7*d.* due from him to the society for goods. Similarly upon June 30, he being indebted to the society in the sum of 20*l.* 2*s.* 11*d.*, a further amount of 20*l.* was debited to his share account and credited against his debt for goods. The circumstances of the transactions of July 20 and November 25 were exactly the same, and by the last debit of 14*l.* 10*s.* 11*d.* the amount standing to Morgan's credit on account of his shares was reduced to the sum of 4*l.* 19*s.* 1*d.* The formal resolution for the winding-up of the society was passed in February, 1899. The summons taken out by the liquidator was dismissed by the county court judge, and the liquidator appealed.

Herbert Reed, K.C. (*John Sankey* with him), for the appellant. The four transactions were in substance withdrawals of capital by the respondent, and were all invalid; it makes no difference that they were effected by means of book entries, there being no money which the respondent could have drawn out. The effect of the transactions was to relieve the respondent in two ways—from the loss of his capital and from the payment of his account for goods. First, no notice of withdrawal having been given of any of the sums, all the transactions were invalid.

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Secondly, a withdrawal of capital can only be effective where the society is a solvent going concern, not where it is insolvent: *In re Sunderland 36th Universal Building Society* (1); this invalidates the last two transactions. Thirdly, the transaction of November 25 is void as a fraudulent preference under s. 164 of the Companies Act, 1862, having taken place within three months of the passing of the resolution for winding up the society.

S. T. Evans, K.C., for the respondent. The transactions were not in any sense repayments of capital, and were valid; the decision in the *Sunderland Case* (1) is inapplicable to the facts of the present case. Under s. 23, sub-s. 2, of the Industrial and Provident Societies Act, 1893 (2), the society had a lien on the respondent's share capital, and a right to set it off against his account for goods, and the committee dealt with the case under that section; their right to do so was not affected by the insolvency of the society. The power to set-off in that section gives the society a right to set off or balance the moneys of one account of a member against those of another account of the same member; to construe the expression "set-off" as confined to setting off in an action or legal proceeding would be to place upon it far too narrow a construction. It is clear that what was done was a set-off and not a withdrawal, for a mere withdrawal of capital would have left the respondent's goods account untouched. The last transaction was in no sense a fraudulent preference; the respondent was not a creditor of the society, and s. 164 of the Companies Act, 1862, deals only with undue or fraudulent preferences of creditors. [He cited on the last point, *In re The Stenotyper, Limited.* (3)]

Reed, K.C., in reply. The transactions are not within s. 23, sub-s. 2, of the Act of 1893, which is a section in aid of the society and not of the individual member. If s. 23 applies, the last payment is still invalid under s. 164 of the Companies Act,

(1) (1890) 24 Q. B. D. 394.

(2) By 56 & 57 Vict. c. 39, s. 23, sub-s. 2, "A registered society shall have a lien on the shares of any member for any debt due to it by him, and may set off any sum credited to the member thereon in or towards the payment of such debt."

(3) [1901] 1 Ch. 250.

1862. There is no analogy between the position of a shareholder of a company, who is not a creditor of the company, and a member of a society such as the present.

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May 14. The written judgment of the Court (Lord Alverstone C.J. and Lawrance J.) was delivered by

LORD ALVERSTONE C.J. [The learned judge, after stating the facts as above, proceeded:—] It was admitted on the argument before us that no steps had been taken by Morgan to withdraw his capital under rule 16, and that therefore the transactions could not be supported under that rule. It was stated that there were a considerable number of outside creditors, and the question raised is whether under the above circumstances the liquidator is entitled to set aside the transactions, the result of which would be that Morgan would be a debtor and contributory to the society in the amount of 51*l.* 18*s.* 2*d.* for goods supplied. If the transactions are to be regarded as withdrawals of capital by the shareholders, then the case of the *Sunderland Building Society* (1) decides that such withdrawals can only be legally supported when the society is, or believes itself to be, solvent, and under the decision in that case the two last transactions of July 20 and November 25 could not be supported.

A further point was raised with reference to the last transaction of November 25, 1898, that it was void under the 164th section of the Companies Act, 1862, as having taken place within three months of the resolution of winding-up. It was contended on behalf of the respondent that the transactions were in effect carried out under s. 23 of the Industrial and Provident Societies Act, 1893, and that it must be taken upon the facts that the society exercised its right to set off against the amount credited to the member on his shares the debt due from him. The point seems to us one of considerable difficulty. If the words "any sum credited to the member thereon" in sub-s. 2 of s. 23 are to be construed as meaning a sum credited and payable, the principle of the *Sunderland Case* (1) would seem to apply to this extent—that after a society is known to

(1) 24 Q. B. D. 394.

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be insolvent there would probably be no sum to which the member would be in fact entitled; but there seem to us to be great difficulties in this construction. If effect were given to this contention, it would affect the last two of the four transactions which are impeached. Sect. 34 contemplates that the register shall shew the amount paid, or agreed to be considered as paid, of any shares, and as long as the society is carrying on business it is difficult to find any substantial ground upon which it can be held that it is precluded from exercising the right of set-off mentioned in sub-s. 2 of s. 23. The words "set off" in that section do not appear to us to be used in the strict legal sense, but more in the business or accountant's sense as indicating that the society may deduct or write off from the sum credited the amount of the member's debt. It seems to us that as long as a society is carrying on business it may bonâ fide avail itself of the provisions of this sub-section, otherwise it might be necessary to have a valuation of the society's assets or an inquiry into its position before any set-off under the section could be made or entered in the books. Upon the whole, we are of opinion that, the county court judge having found as a fact that the committee acted bonâ fide without any fraudulent intention or without the intention of preferring any particular shareholder, his judgment must be affirmed.

With regard to the further point taken as to the last payment, that it was void under s. 164 of the Companies Act, 1862, we do not think that in any view the transaction would be within that section, Morgan not being a creditor within the meaning of that section. For the reasons we have given, we think our judgment must be for the respondent.

Appeal dismissed.

Solicitors for appellant: *Bell, Brodrick & Gray, for Kenshole, Aberdare.*

Solicitors for respondent: *Riddell & Co., for Walter Morgan, Bruce & Nicholas, Pontypridd.*

W. J. B.

THOMPSON *v.* THE CITY GLASS BOTTLE COMPANY.

1901
June 14.

Employer and Workman—Injury to Workman—"Machinery or Plant connected with or used in the Business of the Employer"—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 1.

A workman was injured while assisting on a Sunday in the removal of a machine in his employers' workshop. The machine, which was defective to the knowledge of the foreman, had broken down on the previous day and had finally ceased to be used in the employers' business at the time of the accident; it was being removed from its place in the centre of the workshop out of the way until it could be finally removed from the employers' premises:—

Held, that the machine was not "machinery or plant connected with or used in the business of the employers" within the meaning of s. 1, sub-s. 1, of the Employers' Liability Act, 1880, and that the employers were not liable.

APPEAL of the defendants from a judgment of the judge of the Bow County Court. The action was brought under the Employers' Liability Act, 1880, to recover damages for injuries sustained by the plaintiff owing to the defective condition of a machine upon the defendants' premises.

The plaintiff, who was a stoker in the employ of the defendants, was allowed (with other workmen) in the intervals of stoking to use a machine for the purpose of making glass stoppers for bottles, for which work he was paid by the defendants. On Saturday, November 24, 1900, the arm of the machine in question was broken off, and the foreman told the men that it was not to be used again, as another machine had been ordered. On the following day, Sunday, the plaintiff with two other men was engaged in removing the machine (which weighed a ton and was on rollers) to its proper position in a corner of the works, when the lever, which weighed 2 cwt., fell on his toe; it fell because the pin was broken. At the time of the accident the machine had finally ceased to be used for the making of glass stoppers, and was being moved out of the way prior to its final removal from the premises of the defendants. The learned county court judge was of opinion

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that the machine, although it had finally ceased to be used in the defendants' business at the time of the accident, was plant within the meaning of s. 1, sub-s. 1, of the Act, and gave judgment for the plaintiff. The defendants appealed.

W. Addington Willis, for the defendants. The defendants are not liable under the Employers' Liability Act, 1880. There was no evidence of negligence. The machine was not "machinery or plant connected with or used in the business of the employer" within the meaning of s. 1, sub-s. 1, of the Act; the sub-section applies only to machinery actually being used, or capable of being used, in the master's business; it cannot include a machine which has been wholly discarded for purposes of the business, and which is nothing more than so much old iron. The facts shew that this machine was at the time of the accident no longer connected with the business as machinery or plant. In *Yarmouth* v. *France* (1), where a horse was held to be "plant" used in the business, Lindley L.J. said: "There is no definition of plant in the Act; but, in its ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business . . . . all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business." A dead horse would not be plant.

[He was stopped by the Court.]

Austin Metcalfe, for the plaintiff. The machine did not cease to be plant until it had been taken right away from the place where it was used to the place where it was to be stored until removal; it was "connected with" the employers' business as long as it was being taken to or away from the place where it was used by the workmen. The case is substantially similar to that of *Brannigan* v. *Robinson* (2), where the wall of an old house which was being pulled down fell owing to the neglect of the builder to have it shored up; it was there held that the dangerous condition of the wall was a "defect in the condition of the works connected with or used in the business." There was ample evidence of negligence, for it was found to be a

(1) (1887) 19 Q. B. D. 647. (2) [1892] 1 Q. B. 344.

reckless act of the foreman to take away the machine in a defective state without removing the defective pin and lever.

Willis, in reply. In *Howe* v. *Finch* (1), which is the converse case, it was held that "works" meant works already completed, and not works in course of construction.

RIDLEY J. I am of opinion that the judgment of the learned county court judge was wrong, and that the injury received by the plaintiff was not caused by any defect in the condition of the machinery or plant connected with or used in the defendant's business. The evidence shews that the particular machine was used by the workmen out of hours for the making of stoppers to glass bottles, and that in order to use it they took it from the place where it was kept and put it in position near the furnaces. On the Saturday the machine, which had previously been out of order, broke down completely, and the foreman told the workmen that a new machine had been ordered, and that this one was not to be used again. The machine remained in the spot where it had broken down until the next day (Sunday), when the plaintiff and other workmen commenced putting it away in a corner, where it was to remain until finally taken away; in so moving the machine, was the plaintiff using plant or machinery connected with or used in the business of the defendants? While he was moving the machine, a lever fell on and injured the plaintiff's toe. Was the machine at that time plant or machinery connected with or used in the employers' business? The county court judge thought that it was machinery or plant in a defective condition. But that is not all that the statute says; it must be machinery or plant connected with or used in the employers' business, and though this machine had been so connected and used, it was not at the time of the accident. The contention for the plaintiff is that the machine was connected with or used in the business until it had arrived at its final resting-place in the corner; but I do not think that that is the point at which the line can be drawn: the line of time must, in my opinion, be drawn at the point when the machine finally ceased to be

(1) (1886) 17 Q. B. D. 187.

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Ridley J.

used in the employers' business. This is illustrated by the definition given by Lindley L.J. in *Yarmouth* v. *France* (1), in which case the question was whether a vicious horse was within the definition of "plant" in the Employers' Liability Act, 1880, and it was held that it could come within that definition. The learned Lord Justice said: "There is no definition of plant in the Act; but, in its ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business—not his stock-in-trade which he buys or makes for sale, but all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business." On the facts of the present case I am of opinion that the old machine ceased to be machinery or plant connected with or used in the defendants' business as soon as the determination had been arrived at, and had been communicated to the hands, that it was to be used no more; after that, it was not kept for employment in the business at all. The case is the converse of *Howe* v. *Finch* (2), in which Mathew J. said that in using the words "connected with or used in the business" the Legislature did not mean "about to be connected with or used in the business."

Thinking as I do that this machine had at the time of the accident ceased to be connected with or used in the defendants' business, I cannot agree with the learned county court judge, whose decision should be reversed. It is unnecessary to deal with the point that there was no evidence of negligence.

BIGHAM J. I agree. The question is whether the plaintiff's injury was caused by a defect in the condition of the machinery or plant connected with or used in this business. It was in fact caused by something which might not unreasonably be called machinery or plant, but not by anything which was at the time connected with or used in the business. In order to succeed, the plaintiff is obliged to say that the words of the section are capable of being read as meaning "by reason of any defect in the condition of the machinery or plant which has ceased to be connected with or used in the business of the employer"; but

(1) 19 Q. B. D. 647. (2) 17 Q. B. D. 187.

in my opinion the language used does not admit of such a construction. It means machinery or plant connected with or used in the business at the time of the accident, and has no reference to things which have ceased to be so connected or used; the accident to the plaintiff, therefore, does not come within any of the words of the section.

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THOMPSON v. CITY GLASS BOTTLE COMPANY.

Bigham J.

Appeal allowed. (1)

Solicitor for plaintiff: *Treadwell.*
Solicitor for defendants: *F. A. S. Stern.*

W. J. B.

NUNN & CO. *v.* TYSON.
TYSON, CLAIMANT.

1901
June 21.

Husband and Wife — Married Woman's Liability to Costs — "Proceeding instituted" — Interpleader Proceedings — Married Women's Property Act, 1893 (56 & 57 *Vict. c.* 63), *s.* 2 — *County Court Rules*, 1889, *Order* XXVII., *rr.* 1, 2, 4 (*a*).

A written claim made by a married woman to goods or chattels taken in execution under the process of the Court, and served by her on the sheriff or high bailiff of a county court, is a "proceeding instituted" by her within the meaning of s. 2 of the Married Women's Property Act, 1893. Where therefore in the subsequent interpleader proceedings she fails to establish her claim to the goods, the Court has jurisdiction under that section to order payment of the execution creditor's costs of the interpleader proceedings out of property of the claimant which is subject to a restraint on anticipation, and to enforce payment by the appointment of a receiver.

APPEAL from the refusal of the judge of the St. Albans County Court to appoint a receiver of the separate estate of the claimant, a married woman.

Judgment having been recovered against the defendant in the county court and execution levied upon his goods, the goods seized under the execution were claimed by his wife by a written notice of claim served upon the high bailiff under

(1) Leave to appeal was refused, but was subsequently granted by the Court of Appeal.

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Order XXVII., r. 1, of the County Court Rules, 1889. Notice of the claim was then duly given by the high bailiff to the execution creditors, and an interpleader summons was issued by the registrar upon the application of the high bailiff under rule 2. Particulars of the goods and damages claimed and of the grounds of claim were subsequently delivered by the claimant under Order XXVII., r. 4 (*a*). At the hearing before the judge and a jury of the interpleader summons the claimant failed to establish her claim, and an application was made on behalf of the execution creditors under s. 2 of the Married Women's Property Act, 1893, for the appointment of a receiver of her separate estate for the purpose of recovering the execution creditors' costs of the interpleader proceedings. The learned county court judge refused to make the order upon the ground that the interpleader proceedings had not been instituted by the claimant, and the execution creditors appealed.

Herford, for the appellants. The proceedings were "instituted" by the claimant within the meaning of s. 2 of the Married Women's Property Act, 1893. (1) The notice of claim which she served upon the high bailiff was the foundation and commencement of the interpleader proceedings, and was a proceeding instituted by her. The judge, in holding that neither the claim for goods nor that for damages was a proceeding instituted by her within the meaning of the Act, and that the interpleader proceedings were instituted by the high bailiff, relied on *Hood Barrs* v. *Cathcart* (2), *Hood Barrs* v. *Heriot* (3), and *Moran* v. *Place* (4); but those cases are not in point. The two former merely decided that an appeal brought by a married woman in an action in which she is a defendant is not a proceeding instituted by her within the meaning of

(1) By 56 & 57 Vict. c. 63 (The Married Women's Property Act, 1893), s. 2, "In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just."

(2) [1894] 3 Ch. 376.

(3) [1897] A. C. 177.

(4) [1896] P. 214.

this section, and it is clear that an appeal is merely a step in an action already instituted. *Moran* v. *Place* (1) is distinguishable, because the entry of the caveat in that case was in its nature a mere warning to communicate with the caveator before allowing any probate proceedings to be instituted, whereas here the married woman made an actual claim to the goods as her own property, and, her claim not being acquiesced in by the execution creditors, interpleader proceedings necessarily followed. [He also cited *Temple* v. *Temple*. (2)]

Arthur Houston, for the respondent. No proceeding was instituted by a married woman within the meaning of the Act. A "proceeding instituted" means a step taken in court, not an act done out of court; it must be something in the nature of the issuing of a writ of summons; as pointed out by Lopes L.J. in *Hood Barrs* v. *Cathcart* (3), it conveys the idea of "an action commenced or proceeding initiated." The decision in *Moran* v. *Place* (1) is entirely in point; the inevitable effect of entering a caveat was that the executors had to bring an action.

[BIGHAM J. The notice served by the claimant is equivalent to a writ in detinue for the return of the goods.

RIDLEY J. If the execution creditors had admitted the claim, and the claimant had got the goods, would she not have got them by a "proceeding instituted" by her?]

No; she would have got them by reason of the abandonment of the execution by the execution creditors upon the real ownership of the goods becoming apparent.

RIDLEY J. I am of opinion that the learned county court judge came to a wrong conclusion, and that the appeal must be allowed. At first, indeed, I was inclined to think that his decision was right, and that the interpleader proceedings commenced with the application for an interpleader summons by the high bailiff; but upon consideration I think that we ought to regard the notice given by the married woman of her claim to the goods as instituting the proceedings within the meaning

(1) [1896] P. 214. (2) (1894) 63 L. J. (Q.B.) 556.
(3) [1894] 3 Ch. at p. 379.

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of the section. The case is not concluded by authority. The judgment of the House of Lords in *Hood Barrs* v. *Heriot* (1) decided only that an appeal was nothing but a step in an action or proceeding already instituted, and was not the institution of fresh proceedings, and that therefore the provisions of s. 2 of the Act of 1893 did not apply to such a case. The decision in *Moran* v. *Place* (2) is that which appears to be most in the claimant's favour. In that case a married woman had entered a caveat against granting probate of a will, and it was contended that by so doing she had instituted the proceedings which subsequently took place. The Court, however, held otherwise, and I have to ask myself what is the distinction between that case and the present. The distinction is, I think, clear: a person enters a caveat without claiming anything; the only claim made by the caveator is that if anything is done in the matter he shall have notice of it, and it is something that happens after the lodging of the caveat which is the real institution of legal proceedings. And there is the further distinction that the person who lodges the caveat can only be the defendant in the action, and the statute does not contemplate a defendant as being the person who institutes proceedings, except by way of counter-claim. (3) The present case is very different; the married woman gave notice to the high bailiff that the goods taken in execution were claimed by her as her separate property under her marriage settlement. If nothing had been done adversely to her claim, if the execution creditors had admitted it to be true, she would by means of the notice have got the goods as against the execution creditors. In that state of affairs I think we may properly say that the married woman instituted the proceedings under which she established her claim to the goods. If the execution creditor disputes a claim, then there follow the proceedings directed by the rules, and an interpleader summons is taken out by the high bailiff; it does not follow, however, that that is the commencement of the interpleader proceedings. The case is different from *Moran* v. *Place* (2) in that the giving of the notice by the married

(1) [1897] A. C. 177.
(2) [1896] P. 214.
(3) See *Hood Barrs* v. *Cathcart*, [1895] 1 Q. B. 873.

woman is a necessary step in the assertion of a claim by her which is subsequently enforced by the issue of an interpleader summons and by the proceedings in interpleader; it is her act, rather than the issue of the interpleader summons, which effectively institutes the proceedings. I think, therefore, that an order for costs should have been made under the section against the claimant.

BIGHAM J. I am of the same opinion. The sole question is whether a married woman who made a claim to goods seized under an execution against her husband instituted a proceeding within the meaning of s. 2 of the Married Women's Property Act, 1893. For my own part, I think that it is only necessary to state the facts in order to demonstrate that she did. The goods were in the hands of the law under an execution levied by the judgment creditors against the judgment debtor, the claimant's husband; the lady desired to make a claim to the goods, and this she could only do in one way, by taking proceedings under the county court rule which prescribes that a written notice of the claim must be given to the officer in whose custody the goods are. The present claimant gave such a notice; with what object did she give it? Clearly that she might be able, in case of need, to proceed to establish her claim, which, when established, would enable her to get goods which were in the custody of the law to answer her husband's debts. To get the goods for herself was the object she had in view; I cannot see that her object can have been anything else. Matters, however, did not stop there; an interpleader summons was issued by the high bailiff and served upon the execution creditors for the purpose of enabling them to fight the interpleader issue in which the claimant was to be the plaintiff. Then before the trial the claimant served particulars of her claim, as required to do by the rules. If the claimant had succeeded at the trial of the issue, could any one say that she had not instituted the proceedings? I do not think that any one could be found who would make the suggestion. It makes no difference that she failed at the hearing, for she failed in a proceeding instituted by her in order to get relief in the county

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court. I am therefore clearly of opinion that the case falls within the section.

The authorities which have been cited have really no application to the case. In *Hood Barrs* v. *Heriot* (1) a married woman had brought an unsuccessful appeal in an action not instituted by her, and it could not be successfully contended that she had instituted a proceeding within the meaning of the section; though it is to be remarked that Lord Herschell in his judgment regretted that the section was so framed that it was not possible to give the respondent the costs of the unsuccessful appeal. I think we should be putting a very narrow construction on the section if we were to hold in the present case that no proceeding had been instituted by the claimant.

Appeal allowed.

Solicitor for appellants: *E. W. Reeves, for Pickin & Sedgwick, Berkhampstead.*

Solicitors for respondent: *Philpot & Morrell, for Morrell & Son, Oxford.*

(1) [1897] A. C. 177.

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1901
May 8, 9.

MACOUN *v.* ERSKINE, OXENFORD & CO.

Stock Exchange, Usage of—Closing of Client's Account by Broker—Sale and Repurchase of Shares by Broker—Validity of Closing.

The defendants, who were stockbrokers, by the plaintiff's instructions effected on his behalf contracts on the Stock Exchange for the purchase of shares, upon which they incurred liability to a considerable amount. The plaintiff not providing the defendants with funds to meet that liability, the defendants became entitled to close the account, which they did in respect of the various contracts in the following manner. They got a jobber in the market to make a price for the shares, and, the jobber naming a fair market price, a bargain was made by the defendants with the jobber for the sale of the shares to him at the price fixed and for the repurchase of the shares by them from him for the next account. The plaintiff sued the defendants for wrongfully selling the shares in contravention of an alleged agreement by them to keep the account open. The defendants counter-claimed the difference between the amount of the prices at which the shares were sold to the different jobbers as aforesaid and the amount of the prices at which they were purchased for the plaintiff. The jury at the trial found that the defendants had agreed to keep the account open only on condition that the plaintiff would provide them with money to meet the liability incurred, and that the plaintiff had not done so. Thereupon the judge gave judgment for the defendants for the amount claimed by them on their counter-claim. On application to the Court of Appeal for judgment or a new trial, the plaintiff contended that the closing of the account was not valid, on the ground that the sale of the shares was a mere form, and the defendants, acting in a fiduciary capacity, were not entitled to repurchase the shares on closing the account:—

Held, that the defendants were entitled to retain their judgment.

By A. L. Smith M.R. and Romer L.J.: There was nothing on the facts to shew that the transaction by which the account was closed was otherwise than valid.

By Vaughan Williams L.J. and Romer L.J.: Having regard to the manner in which the plaintiff's case had been shaped at the trial, it was not open to him to raise in the Court of Appeal the point that the transaction between the defendants and the jobbers as aforesaid was not a valid mode of closing the account.

APPLICATION by the plaintiff for judgment or a new trial in an action tried by Mathew J. with a jury.

The action was brought by the plaintiff against the defendants, who were stockbrokers, to recover damages from them for

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(1.) selling certain shares called Boulder Perseverance shares, which they had bought on the Stock Exchange on account of the plaintiff, without authority; (2.) wrongfully and contrary to agreement selling a number of other shares which they had bought for the plaintiff on the Stock Exchange. The defendants counter-claimed for a balance of account alleged to be due from the plaintiff to the defendants in respect of Stock Exchange transactions into which they had entered on behalf of the plaintiff as his brokers.

The plaintiff obtained a verdict and judgment with regard to the first head of claim, but the facts with regard to that are immaterial to the present report, and are therefore not stated.

With regard to the second head of the plaintiff's claim and the counter-claim, the facts, so far as material to this report, may be summarised as follows. The defendants had on the plaintiff's behalf, and by his instructions, effected as brokers various contracts for the purchase of shares on the Stock Exchange, upon which liabilities had been incurred by them to a considerable amount. The plaintiff's case at the trial was that the defendants had closed the account in respect of these contracts contrary to agreement. The defendants' case was that they had only agreed to keep the account open any longer on condition that the plaintiff would provide for payment of the balance due upon the contracts, that the plaintiff had failed to do so, and that they had consequently closed the account as they were entitled to do. The account was closed in the following manner in respect of the various contracts. The defendants' authorized clerk went into the market and asked a jobber to make a cash price for the shares, which he did. The clerk informed the jobber that the defendants would buy the shares back from him. A bargain was accordingly made for the sale of the shares to the jobber at the price fixed by him and for the repurchase of them by the defendants for the next account. It appeared at the trial that the sales so made to the different jobbers were at fair market prices, and the plaintiff withdrew any suggestion of mala fides on the part of the defendants with regard to the mode in which the account was closed. The jury found, in answer to questions

left to them by the learned judge, that the defendants agreed to keep the account open only on condition that the plaintiff would provide money for payment of the balance, and that the plaintiff did not take reasonable means to provide for the discharge of his liabilities to the defendants.

By their counter-claim the defendants credited the plaintiff with the amount of the prices at which they had sold the shares to the jobbers as before mentioned. The learned judge on further consideration gave judgment for the plaintiff for damages on the first head of claim, and for the defendants on the counter-claim for the amount claimed.

A. Powell, for the plaintiff. The defendants were not entitled to recover on their counter-claim, which rested entirely on the basis that the account had been properly closed. There was no valid closing of the account. Apart from the usage of the Stock Exchange, the brokers would have no right to sell against their client, and by that usage a sale is necessary in order to close the account. There was no real sale here; the sale was a mere form, and the substance of the transaction was that the defendants, who were acting in a fiduciary capacity, took over the property of their principal at a price named by a jobber. That is not a valid mode of closing the account. It may not be shewn that in the particular case the price was not a fair one, but it is contended that such a transaction is necessarily invalid as between an agent and his principal. If such a transaction were valid, there would be no guarantee that the true price would be fixed as between the jobber and the broker closing the account. The custom as to closing a client's account on the Stock Exchange has been discussed in *Lacey* v. *Hill, Crowley's Claim* (1); *Lacey* v. *Hill, Scrimgeour's Claim* (2); *Davis & Co.* v. *Howard* (3); and it has never been suggested that there was any custom of the Stock Exchange which justified closing the account in any other manner than by a sale. *Walter* v. *King* (4) is distinguishable. There the broker had taken up, and paid for, the shares on the settling day.

(1) (1874) L. R. 18 Eq. 182.
(2) (1873) L. R. 8 Ch. 921.
(3) (1890) 24 Q. B. D. 691.
(4) (1897) 13 Times L. R. 270.

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It was not a question of closing the account in the proper sense of the words, and in that case there was no market for the shares, and it was therefore not possible to sell them. There is no authority for the proposition that the broker is entitled to close the account by merely having a price fixed and giving credit to the client for that price. [He also cited *Parker* v. *McKenna* (1); *Rothschild* v. *Brookman*. (2)]

Isaacs, K.C., and *R. J. Willis*, for the defendants. The case of *Walter* v. *King* (3) is conclusive to shew that there was a valid closing of the account in this case. The effect of the transaction with the jobber was that a real contract for sale of the shares was effected at a fair price, and it made no difference whatever to the plaintiff that the defendants at the same time repurchased the shares on their own account. It is not a question of the sale and repurchase of specific shares belonging to the plaintiff, as to which possibly different considerations might apply. If the plaintiff's contention is correct, the only result is that he was not entitled to the credit given by the counter-claim. The plaintiff in his claim treated the transaction as a sale, and complained of it as a wrongful sale. There was no question left to the jury, and no finding, either by the jury or the judge, as to whether the sale was a sham. The question really fought at the trial was whether the defendants were entitled to sell when they did. The plaintiff cannot, having regard to the course which the case took at the trial, now raise the point that there was no sale.

A. Powell, for the plaintiff, in reply. The defendants' counter-claim must stand or fall by the assumption that there was a valid closing of the account. If there was no such closing, the rights of the parties would be altogether different. If the closing was wrongful, the plaintiff would be entitled to elect; either to repudiate it, in which case the defendants would not be entitled to indemnity at all, and, having repudiated their principal's title, must be held to have taken to the contracts for better or worse on their own account; or to affirm it, in

(1) (1874) L. R. 10 Ch. 96.
(2) (1831) 2 Dow & Cl. 188; 5 Bligh. (N.S.) 165; 30 R. R. 147.
(3) 13 Times L. R. 270.

which case the plaintiff would be entitled to any profits which the defendants, acting as his agents, might have made by the repurchase.

A. L. SMITH M.R. In this case it seems to me clear that the issue which, as regards the second head of claim, the plaintiff really went down to try was whether the defendants were justified in closing the account by selling the shares at the time when they assumed to do so, or whether that sale was wrongful; and on that issue the defendants succeeded. Therefore the plaintiff failed in making out the wrongful conduct which he alleged against the defendants under that head of claim. But, that being so, the defendants say that, upon the closing of the account, a balance was due to them, and they counter-claim the amount of that balance from the plaintiff. The plaintiff thereupon alleges that the account was not closed in a valid manner. It appears that all imputations of anything in the nature of dishonourable conduct by the defendants, in respect of the mode in which the account was closed, were withdrawn at the trial; and it seems clear that the best price that was obtainable in the market was obtained for the shares that were sold on behalf of the plaintiff. Under those circumstances the plaintiff's counsel was driven to set up this contention: he says now, not that the best price was not obtained for the shares, but that there was really no sale at all to the jobber, because it was a sale by agents in a fiduciary capacity, and they bought back the shares which were their principal's property. It is true that the plaintiff sued the defendants on the footing that this was a sale, claiming damages for it on the ground that it was a wrongful sale, but, when he gets into this Court, he says that the learned judge ought to have directed the jury that this transaction with the jobber was no sale at all. I pointed out during the argument that the result of this contention would be that the credit which the defendants have given in their counter-claim ought not to have been given, and that the plaintiff would be liable to the full amount of the liabilities incurred by the defendants on his behalf. But I do not agree that there was no sale at

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A. L. Smith M.R.

all. In my judgment there was a sale, and I agree with the defendants' counsel that this case is really covered by the decision in *Walter* v. *King*. (1) In that case the facts as stated in the report are as follows. The defendant instructed the plaintiffs, who were stockbrokers, to buy for him a large number of shares, and the plaintiffs bought and paid for them. On the defendant failing at the proper time to find the purchase-money, the plaintiffs went to a jobber on the Stock Exchange, and had a fair price fixed for the shares, and went through the form of selling and buying back the shares at that price; and they sued the defendant to recover the difference between that price and the sum which they gave for them. Charles J. gave judgment for the plaintiffs. The defendant appealed, and it was contended on his behalf that the plaintiffs were not justified in buying the shares for themselves, that their only proper course was to sell the shares in the market, and claim the difference between the bought price and the sold price. Lord Esher M.R. gave judgment to the effect that "The case had been rightly treated as a case of indemnity. The effect of a principal's employing a broker to buy shares on the Stock Exchange was that the broker was authorized to buy the shares by making himself personally bound to pay for them; and, if the principal failed to supply the purchase-money at the proper time, and thus left his agent to suffer the consequences of his liability, the principal was bound to indemnify him. It followed that, in accordance with the general law of indemnity, which was thoroughly well settled, the broker was bound to minimise the loss as far as possible. In this case it was the duty of the broker to give credit for the value of the shares which he had kept for himself. The time when such value ought to be fixed would of course vary in different cases according to the circumstances. Here the value had been fixed at a reasonable time, having regard to the facts of the case, and Charles J. considered that it had been fixed at a fair amount. The appeal must therefore be dismissed." Lopes L.J. and Chitty L.J. concurred in that judgment. In my judgment what Lord Esher M.R. said in that case really negatives the

(1) 13 Times L. R. 270.

contention of the plaintiff's counsel in this case. For these reasons I think that the appeal must be dismissed.

VAUGHAN WILLIAMS L.J. I agree. Speaking for myself, I do not wish to rest my decision upon the case of *Walter* v. *King* (1), because I think that the facts of that case are very different from those of the present. In that case the brokers had actually taken up and paid for the shares, and had not sold them, because it was impossible to sell them, and they went through the form of a sale to a jobber for the purpose of fixing the value of the shares. Not only from the fact of that operation having been gone through in the jobber's books, but also from the evidence of various witnesses from the Stock Exchange, it appeared that the prices entered in the books in this very unreal transaction did represent the real value of the shares. Having regard to the difference which in my opinion exists between the facts of the two cases, I prefer not to rest my judgment on the case of *Walter* v. *King* (1), or anything that was said in it. Now, what was the present case? I shall confine my observations entirely to the counter-claim. The defendants counter-claim for a balance due in respect of purchases of shares made for the plaintiff, their customer. In consequence of the plaintiff not providing them with funds, they had to close the account, and they sold the shares for the purpose of the closing of the account. The plaintiff's contention was that the defendants, having regard to the agreement made between him and them, had no right to close the account when they did, and consequently had no right to sell the shares; and he claimed damages against them for so doing. The learned judge at the trial left to the jury the specific questions (1.) whether the defendants agreed to keep the account open only on condition that the plaintiff would provide for the payment of the balance, and (2.) whether the plaintiff took reasonable means to provide for the discharge of his liabilities to the defendants. The jury answered both those questions in favour of the defendants, and their counter-claim. Under those circumstances let us consider the real

(1) 13 Times L. R. 270.

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meaning of the counter-claim. This is not a case in which specific shares had been bought or taken up. It was a sale of a kind of shares. It was like a sale of 100 bushels of wheat or 100 quarters of oats of a particular quality. A certain number of shares answering a particular description were purchased by the brokers on behalf of their customer, and these shares were never taken up. It was of course the obligation of the plaintiff to provide the brokers with the money to perform that contract in order to free the brokers from liability upon it, the brokers being placed by the rules of the Stock Exchange really in the position of sureties for their customer. On the finding of the jury it is clear that the plaintiff did not provide that money. That being so, what was the right of the brokers? It was to close the account. They had a right, if they chose, to go to the jobber who had sold the shares, to pay him for them, and take delivery of them themselves. If they had done so, a state of things similar to that in *Walter* v. *King* (1) would have arisen. Having taken up the shares, and paid for them, they would have had a cause of action in respect of the whole price of the shares against their customer. That action being, as pointed out by Lord Esher M.R. in *Walter* v. *King* (1), an action in the nature of an action of indemnity, they would have had to give credit for the value, whatever it was, of the specific shares taken up. In this case, as in most cases, the shares were not taken up. The brokers did not adopt that course. That being so, the brokers had a right, and I should say it was their duty, to endeavour to minimise the loss as much as they could. The real meaning of the counter-claim is simply that the brokers have taken action to minimise the loss. They have settled the liability which they have incurred for the customer at a certain amount, and it is for that amount they sue. They do not say that they have paid the total price of the shares, for they have not done so. Their claim is that, the customer being bound to indemnify them against the liability which they have incurred on his behalf, they have settled that liability in accordance with the usage of the Stock Exchange at a certain amount, and they claim that amount from the

(1) 13 Times L. R. 270.

customer. In the present case, on the merits, I do not see that the plaintiff really has anything to complain of with regard to the closing of the account. He cannot, in the face of the findings of the jury, say that the defendants had not a right to close the account when they did; and the settlement which was effected was not one which really did him any harm. Still, apart from what I shall presently mention, he would be entitled to say, if he chose, that the settlement which was made was not so made as to be binding on him; that the effect of his refusing to be bound by the settlement might be that he would be liable to the brokers for the full amount of the price of the shares as damages for breach of his contract with them, which was not only a contract of indemnity, but a contract to provide money for their indemnification a reasonable time before it was wanted; but nevertheless that he had a right to say that he was not bound by the settlement which they had made, and declined to take advantage of it. If the customer were in a position to substantiate that contention, then, whatever the merits of the case might be, I think that he would be entitled to meet the claim of the defendants as formulated in the counter-claim in that way. Now, as I understand it, the way in which the plaintiff puts his case is this: that, though the brokers have a right for their own benefit and for his benefit to go on the market and settle the liability which they have incurred on his behalf by closing the account, he is entitled to the full benefit of the bargain made by them for that purpose, and that they cannot settle the liability without giving him the full benefit of that settlement. The objection taken by the plaintiff to the mode adopted for closing the account is this. He says that the brokers went to jobbers, not the same as those with whom the original contracts had been effected—not that I think that that fact is really material—and did not simply sell the shares to them, and then charge him with the difference; but, at the same moment, and as part of the same bargain, they made a bargain that they would buy back the shares, which they were professing to sell, at the price which had been fixed, not, it is true, for delivery on the same day, but on the next account day; and he says that is not such a

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bargain as the brokers were entitled to enter into for the purpose of closing the account, the suggestion being—not that it was shewn to be so in the present case—that such a transaction might possibly lead in such a case to the real market price not being fixed by the jobber as the price at which the shares were to be taken to be sold to him. Speaking for myself, I am disposed to think that it is an unfortunate position to some extent for a broker to put himself into, and that it would be better that a broker, selling to close a customer's account, should simply go into the market and sell, and should not then and there make a bargain with the purchasing jobber for the repurchase of the shares at the next account. I think that such a course would be the better course to pursue, but I do not say that there was anything wrong in the present case. It was conceded to the full at the trial that there was nothing wrong in the transaction which took place, in the sense of there being anything dishonourable or unfair, or any intention to act unfairly. It was stated in evidence that such transactions were common on the Stock Exchange, and it is contended that there is nothing in law to prevent a broker, in closing a customer's account, from taking the course which was taken in this case. I must say that I do not feel clear as to that, but in my view of this case the question whether that is so does not really arise here, for I do not think that it was really raised on the trial. It seems to me that, if it had been meant to raise that question at the trial, other evidence would have had to be gone into, both on the examination-in-chief and the cross-examination of the witnesses. Having regard to the mode in which the case was conducted in the Court below, I think that, whether the point taken by the plaintiff's counsel is an arguable point or not, it is not really raised in the present case. I would only say in addition that, though I have, as a lawyer, expressed an opinion that it would be better that a broker closing a customer's account should do so by a clean sale with no concomitant bargain with the jobber on his own account, yet, if the general practice of the Stock Exchange were to the contrary, I should not say that my judgment was likely to be better than that of practical

men engaged in these transactions, whose interest it is that their system should accord with the interests of their customers as well as their own interests. But I do not understand from the evidence in this case that the practice of closing accounts in the manner in which the account was closed in the present case is general on the Stock Exchange.

ROMER L.J. I agree in thinking that this application must be dismissed. It seems to me clear that, upon the evidence, and having regard to the findings of the jury, the plaintiff's application, so far as his claim is concerned, entirely fails. Then there remains the question of the counter-claim. It appears to me in the first place that the point which has been taken by the plaintiff's counsel with regard to the counter-claim is not really open to him, having regard to the course which matters took at the trial in the Court below. But, apart from that, it appears to me that, when the plaintiff made default in performance of his obligation to the defendants, as the jury have found that he did, and when he left the defendants to bear the liability on the contracts which they had entered into for him, the defendants were entitled to get out of their personal liability under those contracts by paying the least sum that would free them therefrom. Now I think that in substance, so far as the facts bearing on this point were gone into in the Court below, this was really the course adopted by the defendants. The shares purchased on account of the plaintiff were not and never have been taken up. Upon ascertaining the true market price of the shares on the day when the defendants resolved to close the account, the difference between that price and the price at which the shares were originally purchased would necessarily be the amount required to free the defendants from the liability incurred by them on the plaintiff's behalf. It appears to me, upon the facts so far as they are before us, that the defendants did so ascertain the amount of their liability, and got rid of it by paying the difference between the two prices; and I do not think that it made any difference to the plaintiff in the circumstances of this case that the procedure adopted by the defendants was to make a contract for the sale of the shares at the true

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market price, and at the same time to contract for their repurchase for the next account. The latter circumstance appears to me immaterial in this case when one looks at the true substance of what took place, which is what I have indicated. The result is to my mind that the amount claimed by the defendants' counter-claim as the balance of account is the correct amount due to them by way of indemnity from the plaintiff. We have not to consider here the question as to whether or not the plaintiff may have had any separate rights in respect of the repurchase of the shares. It appears to me, therefore, that the application fails and should be dismissed.

Application dismissed.

Solicitors for plaintiff: *E. C. Rawlings & Butt.*
Solicitors for defendants: *Lawson & Lawson.*

E. L.

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[IN THE COURT OF APPEAL.]

ERSKINE, OXENFORD & CO. *v.* SACHS AND ANOTHER.

Stock Exchange, Usage of—Closing of Client's Account by Broker—Sale and Repurchase of Shares by Broker—Profit made by Broker on Transaction in Fiduciary Capacity.

Stockbrokers had on behalf of clients made a contract for the purchase of shares on the Stock Exchange. The clients having failed to provide the money for the price of the shares, the brokers, for the purpose of closing the clients' account, went into the market, and sold a like amount of shares to a jobber, and, as part of the same transaction, repurchased the shares from him on their own account. By reason of the sale and repurchase being effected by one transaction, the brokers were enabled to repurchase the shares at a lower price than they would have had to pay if they had purchased them in the market in the ordinary way. The brokers in their account with the clients charged them commission on the sale of the shares to the jobber:—

Held that, the brokers having acted in a fiduciary capacity in the sale of the shares, and having, by reason of that sale and the repurchase being effected as one transaction, obtained a profit for themselves, they were bound to account for that profit to their principals, the clients.

APPLICATION by the defendants for judgment or a new trial in an action tried before Ridley J. and a jury.

The action was by the plaintiffs, who were stockbrokers on the London Stock Exchange, to recover from the defendants a balance alleged to be due in respect of transactions on the Stock Exchange, in which the plaintiffs had acted as brokers for the defendants.

The defendants by their defence alleged that the plaintiffs had wrongfully sold shares which they had contracted to purchase for the defendants on the Stock Exchange, and were therefore not entitled to be indemnified by the defendants against any payments and liabilities in respect of the shares; that the plaintiffs, if they were entitled to close the defendants' account, which was denied, did not close such account, but entered into a merely colourable closing by a sale to, and repurchase from, jobbers other than those with whom the shares were open for the defendants, and did not put an end to the defendants' liability to such last-mentioned jobbers; and that the plaintiffs had on August 31, 1900, in breach of their duty as the defendants' brokers, themselves bought the defendants' shares and had made large profits in respect of them; and the defendants counter-claimed damages for the plaintiffs' breach of duty in wrongfully selling the shares as aforesaid, and an account of the profits made by the plaintiffs in respect of their purchase of the defendants' shares as aforesaid.

At the trial it appeared from the evidence that the defendants had through the plaintiffs as their brokers entered into a series of speculative transactions with regard to the purchase and sale of shares on the Stock Exchange, which resulted in a considerable amount becoming due from the defendants by way of differences. The plaintiffs, on being requested by the defendants on the approach of the mid-August account, 1900, to carry over the outstanding contracts for the purchase and sale of shares, which they had entered into on behalf of the defendants, refused to do so, unless the defendants undertook to find the money for payment of the amount due for the account at the end of August, and gave notice to the defendants that, unless they did so, they should close the account. The defendants promised to find the necessary funds for August 30, and the shares were accordingly carried over to that day. The

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defendants not performing their promise, the plaintiffs sent their authorized clerk into the market on August 31 for the purpose of closing the defendants' account. With regard to certain of the contracts for the purchase of shares open for the defendants, he proceeded as follows. He went to different jobbers, other than those with whom the contracts had been made, and, for the purpose of closing the account, entered into transactions of substantially the same character with each of them. The plaintiffs' clerk and the different jobbers were called for the plaintiffs at the trial, and gave an account of the transactions. The transaction between the clerk and a jobber named Podger in respect of 1000 Johannesburg Investment shares may be taken as representing what took place in each case. Mr. Podger's evidence was in substance as follows. He stated on examination-in-chief that on August 31, 1900, the plaintiffs' authorized clerk came to him and asked him the price of Johannesburg Investment shares; that he replied that the market price was two one-sixteenth to one-eighth (i.e., 2*l.* 1*s.* 3*d.* to 2*l.* 2*s.* 6*d.*) per share; that the clerk then asked him whether he would make that price; that he said, Yes; that the clerk then said that he would sell 1000 shares at two one-sixteenth and buy them back at 1½*d.* over; and that he agreed to that. He stated that, if a broker sold and bought back again, there being no risk, he was content with a smaller profit, because he did not have to wait for the opportunity of selling, or run the risk of losing money. On cross-examination he said in substance that, if the clerk had simply wanted to buy Johannesburg Investment shares from him, he would have had to give two one-eighth (i.e., 2*l.* 2*s.* 6*d.*) per share; that he, the jobber, got the shares at two one-sixteenth, and the clerk got them back, not at two one-eighth, but at an advance of only 1½*d.*, because the bargain was put to him in that way; that that was not the ordinary turn of the market, but the turn was lessened because the two transactions were done at the same time, and therefore he (the jobber) ran no risk. The plaintiffs' authorized clerk who had effected the transactions was called, and he confirmed Podger's account of the transaction between them,

and stated that the other transactions with other jobbers were all done in the same way. In the contract-notes and account sent by the plaintiffs to the defendants, the plaintiffs charged the defendants with commission in respect of the sales of shares on August 31. The learned judge left to the jury the question whether the plaintiffs had obtained for the defendants' shares the proper market price then obtainable, and the jury found a verdict for the plaintiffs. The learned judge upon further consideration entered judgment for the plaintiffs on the claim and counter-claim.

Robson, K.C., and *J. R. Atkin*, for the defendants. The plaintiffs did not really close the account against the defendants at all. They did not really sell these shares so as to bind the defendants. They in substance took over the shares themselves at a price which was clearly not the best price obtainable under the circumstances. What was done was a mere form. The shares were not substantially sold at all, but merely put through the jobbers' books as a matter of form. It is submitted that the plaintiffs were not entitled to buy back their clients' shares themselves. They were only entitled to close the transaction by a real sale, in order to put an end to the liability for their own and the clients' benefit. In this case they have not put an end to the liability at all. They have only put the shares through the jobbers' books with the result that they have themselves got the shares at less than the best price obtainable. It is not suggested that the plaintiffs or their clerk intended to act dishonestly, or unfairly, or acted with any mala fides, but it is contended that the necessary effect of what the plaintiffs' clerk did was that he did not get the price at which the shares were bought by the jobbers fixed at as high a figure as would have been fixed if he had informed them in the first instance as to the real nature of the transaction which he wished to enter into. If he had done so, the jobbers would have named closer prices because they would run no risk—that is to say, they would have named a higher price than the ordinary market price as the price at which they were willing to buy, and a lower price than the

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ordinary market price as the price at which they were willing to sell. The jobbers' turn would have been lessened in favour of the defendants as well as in favour of the plaintiffs, whereas the effect of what the clerk did was that it was only lessened in favour of the plaintiffs, because the defendants are only credited with the ordinary market price, but the plaintiffs got the shares at only $1\frac{1}{2}d.$ over the price at which they were sold for the defendants.

The plaintiffs on their own admission clearly acted as agents for the defendants in selling the shares on August 31, for they have charged commission in respect of that sale. The transaction with regard to the Johannesburg Investment shares may be taken as an example of all the transactions. The transaction, by which the plaintiffs sold and repurchased the shares, was all one transaction; and it is clear that on that transaction the plaintiffs obtained a profit of $1s.$ $1\frac{1}{2}d.$ per share by reason of the fact that they got the shares at a price less by that amount than the market price. Acting as they did in a fiduciary capacity in the sale of the shares, they cannot be allowed to make a profit for themselves out of the transaction without the knowledge of their principals, but must account for the profit which they so made to the defendants. The defendants are therefore entitled on the counter-claim to an account of the profits so made by the plaintiffs. The case of *Walter* v. *King* (1) is distinguishable. In that case the brokers do not appear to have assumed to sell as the client's agents or to have charged him commission. The closing of the account being invalid, and the plaintiffs not being entitled to repurchase the shares, the defendants are also entitled to an account of any profits which the plaintiffs may have made upon the shares.

Isaacs, *K.C.*, and *R. J. Willis*, for the plaintiffs. The jury have found that the fair market price for these shares was obtained by the plaintiffs on the defendants' behalf. That being so, the case is really concluded by authority. It is contended that the sale and repurchase of the shares by the plaintiffs were really independent transactions, but in any case they

(1) (1897) 13 Times L. R. 270.

were transactions by which the shares were sold at one price and repurchased at another, and, if they were sold at the proper price, the defendants are bound by that sale. In the recent case of *Macoun* v. *Erskine, Oxenford & Co.* (1) it was held in this Court on the authority of the decision in *Walter* v. *King* (2), likewise in this Court, that a transaction such as took place in the present case was a valid sale for the purpose of closing the account. It would be different, no doubt, if there were a collusive transaction between the broker and the jobber, by which there purported to be a sale of the shares at a price below the real value. But the jury here have found that not to have been the case. The question whether there was a real sale must be one of fact, not of law, and the jury must be taken to have found that there was a real sale to the jobber. There was no breach of duty here by the plaintiffs. All that they were bound to do was to get for the defendants the best or true market price for the shares—that is to say, the price which a jobber would give if he were simply buying the shares. When the broker has done that, the client has nothing to do with what happens subsequently. It is no concern of his whether the broker afterwards repurchases the shares, and, if so, at what price. The transactions are independent, and in the transaction of repurchase the broker does not act as the client's agent. The plaintiffs cannot be considered as having made a profit on the sale of the shares for the defendants. The plaintiffs having got the full market price for the shares on the defendants' behalf, their fiduciary relation to the defendants was at an end. The defendants never asked to have the question left to the jury whether the sale and repurchase were one and the same transaction or independent transactions, and the judge in dealing with the case on further consideration treated them not as one but as two transactions. The fact that the plaintiffs, in closing the account, did not go to the jobbers with whom they had carried over the shares does not affect the case in the least. These contracts are not for the sale and repurchase of specific shares, but only of a like number of unidentified shares. It is not in these cases a

(1) Ante, p. 493. (2) 13 Times L. R. 270.

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question of the brokers' selling and repurchasing specific shares belonging to the clients, but of executory contracts, one by the brokers on behalf of the clients for the sale of a certain number of shares, and the other by the brokers on their own account for the purchase of a like number of shares. The word "repurchase" is really misleading. The clients have two contracts, on the one side one for the purchase, and on the other side one for the sale of the same number of shares, and the matter is not affected by the fact of the purchase from the jobber by the brokers of a like number of shares which was not made by them in a fiduciary capacity. According to the custom of the Stock Exchange as shewn by the authorities, the client could in such a case call on the jobber to take up the shares purchased by him, and the jobber could not say that he would not, because his book was even, he having resold to the broker; which shews that the transaction of repurchase by the brokers is independent of the sale to the jobber on account of the clients.

J. R. Atkin, in reply.

A. L. SMITH M.R. This is an action by the plaintiffs, who are stockbrokers, for a balance alleged to be due to them from the defendants, who had been their clients, in respect of transactions on the Stock Exchange, upon the closing of the account between them. There is no doubt that the plaintiffs had a right to close the account, because the defendants had promised to pay the amount due on the transactions entered into by August 30, and had not performed that promise. The plaintiffs, upon the defendants' so making default, closed the account, as they had a right to do, and they claim the balance which appears to be due upon the account as closed. The defendants in answer to that claim set up various contentions. First, they say that the account was not closed at all, because the plaintiffs bought back from the jobbers the shares which they had sold to them for the purpose of closing the account. It seems to me that, having regard to the decision of this Court in the case of *Walter* v. *King* (1), in which there was a sale

(1) 13 Times L. R. 270.

and repurchase of shares by brokers under circumstances similar to those in the present case, it is not possible to say that there was no closing of the account in this case. I do not think that it is competent to the defendants after that decision to reopen the question whether there is under such circumstances as existed here a closing of the account. In the case of *Macoun* v. *Erskine, Oxenford & Co.* (1) an attempt was made to reopen this question, and the majority of the Court in that case followed the decision in *Walter* v. *King* (2), and therefore, so far as this Court is concerned, this point must be considered to be concluded by those decisions. Then what is the next point? It is said that the plaintiffs did not get the best price that could have been obtained for the shares. Can it be said that the plaintiffs, in closing the account, sold these shares otherwise than at a fair and honest price, or I will say the best price which could at that time be obtained from the public? That question was left to the jury, and they found, on evidence clearly entitling them to do so, that the sale was an honest sale at the best price which could be obtained. Therefore the defendants have no ground for complaint with regard to the price at which the shares were sold for the purpose of closing of the account. But then there is another point in respect of which I think the defendants have a good ground of counter-claim. They say that the plaintiffs were their brokers, and were therefore acting in a fiduciary capacity, which is clearly shewn to have been so by the contract-notes delivered by the plaintiffs, in which they charge commission on the sales; that, by the mode in which the account was closed, namely, by the plaintiffs' selling the shares and by one and the same transaction repurchasing them from the jobbers for themselves, the plaintiffs got a profit for themselves of 1*s.* 1½*d.* on each of the shares; and that the plaintiffs, being in a fiduciary position, and having, by acting as they did while in that position, made a profit on the transaction, are bound to hand over the profit so made to the defendants as their principals. I think that this point is a good one, and is not covered by the case of *Walter* v. *King* (2);

(1) Ante, p. 493. (2) 13 Times L. R. 270.

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for, as I understand that case, all that was there held was that the broker might buy back the shares; and, though the broker may buy back the shares for himself at an honest price as an independent transaction, yet, if the selling for his client and buying back for himself are by one and the same transaction, and he thereby makes a profit, he must account for that profit to his client. The only difficulty I feel in this case is that the question whether what took place was all one transaction, or was two independent transactions, was never left to the jury. Neither side seems to have asked the judge to leave this question to the jury, and the judge seems to have held that the selling and buying back were not one and the same transaction, but independent transactions. But, on looking through the evidence, I do not see any trace of evidence that they were independent transactions. The evidence of Mr. Podger with regard to the Johannesburg Investment shares, and that of the other jobbers with regard to the other shares, seems to me to shew conclusively that the selling and buying back were all one and the same transaction, and that it was by reason of their being so that the plaintiffs were able to repurchase the shares at a lower price than they would otherwise have paid. It seems to me therefore that, the evidence being all one way, we must treat what took place as one and the same transaction, and, though the plaintiffs sold the shares at a fair and honest price, yet, having made a profit out of the transaction, in which they must be taken to have been acting in a fiduciary capacity, they must account for the amount of that profit to the defendants. The appeal must therefore to that extent be allowed.

VAUGHAN WILLIAMS L.J. I am of the same opinion. It seems to me perfectly plain on the evidence of the plaintiffs' own witnesses that this was a single transaction. After the jobber had made a price, that is to say, had stated the price at which he was willing to deal, the plaintiffs' clerk, who up to that time had not bound himself in any way, made a counter proposal, offering to sell the shares at the price which had been made by the jobber, and to buy them back from the jobber

at an advance of 1½*d.* upon the selling price. To this the jobber agreed, and, till he did so agree, there was no contract at all. If that be the correct view of the transaction, it is plain that the brokers made a profit of 1*s.* 1½*d.* a share on the transaction which they were conducting for their principals, and in respect of which they were to be paid commission. Under these circumstances I think it is clear that they must account for that profit.

I wish to add a word or two, speaking for myself only. I am bound, of course, by the decision of the majority of this Court in the case of *Macoun* v. *Erskine, Oxenford & Co.* (1), but I wish to say that I do not personally depart in any way from the view which I there took to the effect that the case of *Walter* v. *King* (2) does not cover a case like the present. It seems to me that the decision in that case was based on the fact that the shares, which had been the subject-matter of the contract entered into by the brokers on behalf of their client, had been taken up and paid for by the brokers, who had got them in their possession as the outcome of that completed contract. In that state of things the client was found to be unable to pay for the shares which the brokers had so taken up and paid for on his behalf. What was held was that in that case there was no necessity for the brokers to go into the market and sell the shares in order to close the account. In truth and in fact there was in that case no market for the shares. What the Court really held, in my opinion, was that under those circumstances the brokers were not bound to sell, and, inasmuch as the client could not pay for the shares, the brokers were entitled to keep them, debiting themselves with their value. That being so, it was necessary, or at all events convenient, to take steps to fix what the value was on the day when the brokers elected to take to the shares themselves, and for that purpose a jobber was asked to make a price, and the transaction was recorded in the jobber's books. In my opinion that does not really in any way decide what the right and duty of a broker is in a case where a contract, which he has entered into on behalf of his client for the purchase of shares,

(1) Ante, p. 493. (2) 13 Times L. R. 270.

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remains open, and no shares have been taken up and paid for, and the broker is exercising the right, which by the practice of the Stock Exchange he has, of going into the market and making a counter contract, or "hedging" contract, for the purpose of protecting himself and minimising the loss to his client. I am, however, bound by the decision in *Macoun* v. *Erskine, Oxenford & Co.* (1)

There is only one thing more which I wish to say, which is that, if one once arrives at the conclusion that the contract entered into by the broker with the jobber to close the account was entered into under such circumstances that he would have to account to the client for the profit made by him, I should be inclined to think that, if there was nothing more, primâ facie the client would have an option either to adopt the contract and claim the profit, or to repudiate the contract. I am inclined to be of that opinion, though I do not decide the point. The question does not, I think, really arise in this case, because I think, having regard to the manner in which the case has been conducted, it must be treated as one in which the clients are electing to adopt the contract, subject to the plaintiffs' accounting for the profit which they have made. It is therefore not necessary to decide the question whether the client would in such a case be entitled to the option of repudiating the contract.

STIRLING L.J. I agree with the conclusion arrived at by the Master of the Rolls and my brother Vaughan Williams. The point which we now have to decide seems to me a short point, and one as to which the evidence is uncontradicted. The defendants were clients of the plaintiffs, who are stock-brokers. The defendants engaged through the plaintiffs in a series of speculative transactions on the Stock Exchange, the result of which was that the defendants became liable to pay a considerable sum of money. The plaintiffs called upon them to pay this amount, and they promised to pay at the end of August, but they made default in so doing. The plaintiffs thereupon became entitled to close the account in the manner

(1) Ante, p. 493.

usual on the Stock Exchange. To explain what took place without going into details, I will assume that the transactions in which the plaintiffs and the defendants had engaged were a series of purchases, under which the defendants were bound to take delivery of shares and pay for them on August 30. The defendants making default in so doing, the plaintiffs became entitled to go on the Stock Exchange and sell the shares to be delivered at the prices of the day. What took place was this. The plaintiffs sent their authorized clerk into the market to close the transactions. He went for that purpose to several jobbers on the Stock Exchange, but according to the evidence the transaction in each case was in substance the same. The transaction with Mr. Podger in relation to the Johannesburg Investment shares may be taken as an example to shew the nature of the transactions. [The Lord Justice here read the evidence which has been summarised above.] The plaintiffs' clerk was also called, and he admitted that Mr. Podger's evidence correctly represented the transaction. We have therefore the same account of the transaction given by both the parties concerned in it.

The first question raised is whether that transaction was bad as between the defendants and the plaintiffs on the ground that there was no real sale of the shares at all. With regard to that question, I agree with the Master of the Rolls that that question cannot now be raised in this Court, having regard to the decision in *Macoun* v. *Erskine, Oxenford & Co.* (1) I have read the shorthand notes of the judgments, and I think that the Master of the Rolls and Romer L.J. did decide in that case that the mere fact that at the same time as the sale of the shares by the brokers took place there was a repurchase by them did not vitiate the transaction or make the sale bad. I gather that the Master of the Rolls and Romer L.J. thought themselves bound in that case by the decision of this Court in *Walter* v. *King* (2): but, whether this be so or not, it does not seem to me that it is now competent for this Court to reopen that question.

But the case does not rest there. The defendants in this

(1) Ante, p. 493. (2) 13 Times L. R. 270.

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case raise this further point. It is said that the plaintiffs in entering into the transaction of selling these shares really stood in a fiduciary relation to the defendants. It seems to me clear upon the evidence that this was so, because the plaintiffs have sent to the defendants contract-notes and an account, in which they treat themselves as brokers, and charge commission on the sale of the shares, thus shewing that they were acting as the defendants' agents. The defendants further say that the sale and repurchase of the shares by the plaintiffs was one and the same transaction, and that, inasmuch as in selling the shares the plaintiffs were acting in a fiduciary capacity, they cannot retain the profit which they made by means of the repurchase. On the facts this contention of the defendants seems to me to be well founded. What does the account given of the transaction come to? The jobber makes a price, and says that he is willing to buy Johannesburg Investment shares at one-sixteenth, which means at 2*l.* 1*s.* 3*d.* a share, and to sell them at one-eighth, which means 2*l.* 2*s.* 6*d.* a share. Then the plaintiffs' clerk says that he will sell 1000 shares at one-sixteenth and buy them back at an advance of 1½*d.* In the same breath in which he proposes the sale, he proposes the repurchase. The jobber thereupon consents to his proposal. It is literally all one transaction. It is like a transaction where a person buys real estate on the terms that some portion of the purchase-money shall remain on mortgage of the estate purchased. The transaction consists of two parts, one a sale, and the other a mortgage. These two parts may be called in a sense two transactions, though in reality there is only one transaction. It does not appear to me that this is a mere question of words, or one which depends on the circumstance, which simplifies the matter in this case, namely, that the offer for sale and repurchase was in the same breath. It is a question of substance. The sale and repurchase may be called separate transactions, if any one pleases so to call them; but they are not independent transactions. That is the important consideration. That this is so, is shewn conclusively by the evidence given by Podger to the effect that the turn of the jobber was lessened because the transactions took place

at the same time; that is to say, the price on the repurchase was lessened because of the previous sale. The first transaction, that of sale, in which the plaintiffs were acting in a fiduciary capacity, directly influenced the second transaction, that of purchase, in which they were acting for their own benefit, and on which they got a profit, in the sense that they obtained the property with which they were dealing, namely, the same shares, at a price less by 1*s.* 1½*d.* per share than they would have had to pay in the open market without reference to the previous transaction. That being so, I think that the plaintiffs must account to the defendants for that profit.

I do not know of any case which has previously arisen in the same circumstances, but the principle is clear; and, simply by way of shewing how far the application of that principle has been carried, I will refer to one of the points that was decided in the case of *Boston Deep Sea Fishing and Ice Co.* v. *Ansell.* (1) There the defendant was managing director of the plaintiff company, and part of his duty was to enter into contracts for the supply of ice to the company. He was also a shareholder in a company which supplied ice, and, upon the division of the profits earned by that company, bonuses were paid under a provision in the articles of association to shareholders who were owners of smacks, and who took supplies of ice from the company. The defendant entered into contracts with this company for the supply of ice by them to the plaintiff company's smacks, and received bonuses in respect of those contracts. It was held by Cotton L.J., Bowen L.J., and Fry L.J. that for the profit so made the defendant was bound to account, although the plaintiffs could not themselves have received the bonuses, not being shareholders in the company which supplied the ice. Cotton L.J. said: "The question is not whether the company could have directly claimed this sum, but whether, when their agent has received this profit in respect of a contract which he had entered into on behalf of the company as their agent for goods supplied to the company, the company are not entitled as against their agent to claim that money. In my opinion

(1) (1888) 39 Ch. D. 339.

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they are. It is a profit arising from a contract which he, on the part of the company, entered into in consequence of the supply to the company by his order of a particular quantity of ice." So here the plaintiffs obtained a profit on the repurchase of the shares by virtue of the sale which they previously made in a fiduciary capacity, and for that profit they must in my opinion account to the defendants.

Application allowed as regards order for an account by the plaintiffs accordingly.

Solicitors for plaintiffs: *Lawson & Lawson.*
Solicitor for defendants: *G. H. Daniell.*

E. L.

C. A. 1901 *June 7.*

[IN THE COURT OF APPEAL.]

In re BASTABLE. *Ex parte* THE TRUSTEE.

Bankruptcy—Trustee—Disclaimer—"Unprofitable Contract"—Contract for Sale of Lease—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 55.

The trustee in a bankruptcy cannot, under s. 55 of the Bankruptcy Act, 1883, disclaim a contract entered into by the bankrupt for the sale of a lease unless he also disclaims the lease itself.

Sect. 55 was intended to enable the trustee to get rid of an onerous property or contract, and it does not enable him to disclaim a contract merely because it would be more beneficial to the estate that the contract should not be carried out.

The trustee cannot by a disclaimer take away from a purchaser of land from the bankrupt the equitable interest which vested in him under his contract.

APPEAL against an order of a Divisional Court (Wright and Darling JJ.) which declared that a disclaimer executed by the trustee in the bankruptcy of Francis Bastable was void and of no effect.

Bastable was the lessee of a house at Richmond for the term of ninety-nine years from June 24, 1894. On June 22, 1895, he executed a mortgage of the house, by sub-demise for the

residue then unexpired of the term of ninety-nine years (less the last day thereof), to secure the sum of 600*l.* with interest thereon. 300*l.*, part of the principal, was afterwards paid off. On June 5, 1900, Bastable entered into an agreement with Mary Anne Silverstone to sell the leasehold property to her, subject to the mortgage, for the sum of 90*l.* The purchase was to be completed on August 1, 1900. The purchaser paid a deposit of 50*l.* upon the signing of the agreement. The title was accepted by the purchaser, but before completion Bastable was, on August 21, 1900, adjudicated a bankrupt. A correspondence took place between the trustee in the bankruptcy and his solicitors and the solicitors of the purchaser. The trustee at first said that he was willing to complete the sale on payment of 40*l.*, the balance of the purchase-money. A difficulty afterwards arose by reason of the purchaser's requiring to be satisfied that all outgoings in respect of the property had been discharged in accordance with the contract, and meanwhile the mortgagees entered into possession. Ultimately, on December 22, 1900, the trustee executed a document, by which he purported to "disclaim the contract or agreement dated June 5, 1900." He did not disclaim the lease. Notice of the disclaimer was given to the purchaser.

On December 31, 1900, the trustee's solicitors wrote to the purchaser's solicitors as follows: "Our client has now acted upon the intimation we gave you some time since, and disclaimed. We think we ought so far to inform you of his reasons for so doing as to say that the purchaser's demand against the trustee for possession of property of which he is not in possession, and upon terms which produce no substantial benefit to the estate, prevents completion and compels the trustee to disclaim the contract as unprofitable. This he has done, and formal notice thereof has been sent to your client, and we must leave her to prove for the damages, if any, which she may sustain by reason of the disclaimer."

On January 4, 1901, the purchaser gave notice of motion in the Wandsworth County Court for an order declaring that the agreement dated June 5, 1900, "is valid and binding upon A. C. Bourner, as the trustee in bankruptcy of the bankrupt,

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and the above-named M. A. Silverstone, and that the said A. C. Bourner, upon payment of the balance of the purchase-money, may be ordered to convey the property" to the purchaser, and declaring that the document of December 22, 1900, "purporting to disclaim the said agreement is void and of no effect, and further declaring that the said A. C. Bourner as the trustee in bankruptcy of the bankrupt is not entitled to disclaim the said agreement."

The judge of the county court dismissed the motion with costs.

The purchaser appealed to the Divisional Court, who allowed the appeal, and ordered and declared that the agreement of June 5, 1900, "is valid and binding, and that A. C. Bourner as trustee in the bankruptcy is bound to perform the same, or, if required by the said M. A. Silverstone, to disclaim the lease and subject-matter of the said agreement, and that the said A. C. Bourner, upon payment of the balance of the purchase-money, do convey the property . . . . to the said M. A. Silverstone, and doth further declare that the document signed by the said A. C. Bourner, and dated December 22, 1900, purporting to disclaim the said agreement, is void and of no effect."

Leave to appeal was given.

The trustee appealed.

Muir Mackenzie and *W. Whately*, for the trustee. It is the duty of the trustee to disclaim any contract of the bankrupt which is unprofitable, and he has power to do so under s. 55 (1)

(1) By s. 55, "(1.) Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding that he has endeavoured to sell or has taken possession of the property or exercised any act of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him, at any time within three months after the first appointment of a trustee, disclaim the property.

"Provided that where any such property shall not have come to the knowledge of the trustee within one month after such appointment, he

of the Bankruptcy Act, 1883. The carrying out of this contract would clearly be "unprofitable" to the bankrupt's estate.

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may disclaim such property at any time within two months after he first became aware thereof.

"(2.) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person."

"(4.) The trustee shall not be entitled to disclaim any property in pursuance of this section in any case where an application in writing has been made to the trustee by any person interested in the property requiring him to decide whether he will disclaim or not, and the trustee has for a period of twenty-eight days after the receipt of the application, or such extended period as may be allowed by the Court, declined or neglected to give notice whether he disclaims the property or not; and, in the case of a contract, if the trustee, after such application as aforesaid, does not within the said period or extended period disclaim the contract, he shall be deemed to have adopted it.

"(5.) The Court may, on the application of any person who is, as against the trustee, entitled to the benefit or subject to the burden of a contract made with the bankrupt, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as to the Court may seem equitable, and any damages payable under the order to any such person may be proved by him as a debt under the bankruptcy.

"(6.) The Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose.

"Provided always that where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as underlessee or as mortgagee by demise, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or underlessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there shall be no person claiming under the bankrupt who is willing to

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A disclaimer affects only the rights and liabilities of the trustee and the bankrupt's estate; it does not affect the rights or liabilities of third parties, "except so far as may be necessary for the purpose of releasing the bankrupt and his property and the trustee from liability." And any person injured by the operation of a disclaimer may prove as a creditor in the bankruptcy. It was held under the Bankruptcy Act, 1869, that the trustee of a bankrupt who had carried on a contract of the bankrupt for the benefit of the estate, could disclaim it when he found it to be unprofitable: *In re Sneezum.* (1)

[ROMER L.J. When a man has contracted to sell land, is he not only the owner of the land subject to the contract? How can the trustee in the bankruptcy of the vendor deprive the purchaser of his equitable interest in the land? That interest is vested in him, not in the trustee.]

In *Collyer* v. *Isaacs* (2) a debtor by a bill of sale assigned to the grantee specified chattels at his place of business and all other chattels which might at any time thereafter be brought thereon, and it was held that the assignment of after-acquired chattels amounted merely to a contract to assign them, and that the assignor was released by his order of discharge from his liability in damages for the breach of the contract, the damages being provable in the bankruptcy.

[ROMER L.J. There the contract did not affect the land.]

The right of disclaimer conferred by s. 55 extends to any property as defined by s. 168 from which no benefit can accrue

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accept an order upon such terms, the Court shall have power to vest the bankrupt's estate and interest in the property in any person liable, either personally or in a representative character, and either alone or jointly with the bankrupt, to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt.

"(7.) Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt under the bankruptcy."

By s. 13 of the Bankruptcy Act, 1890, the period of twelve months is substituted for each of the periods of three months and two months limited by s. 55, sub-s. 1, of the Bankruptcy Act, 1883.

(1) (1876) 3 Ch. D. 463.

(2) (1881) 19 Ch. D. 343.

to the bankrupt's estate: *In re Maughan.* (1) A purchaser who has an uncompleted contract for the purchase of land ought not to stand in any better position than any other person who has dealt with a bankrupt. The purchaser may perhaps have a lien on the property for his deposit and expenses, but it is submitted that the trustee is not bound to carry out the contract. The disclaimer is valid and effectual to get rid of the liability of the trustee and the bankrupt's estate under the contract. The disclaimer leaves any lien which the purchaser may have untouched, and it gives him a right of proof in the bankruptcy for damages.

[ROMER L.J. In equity the purchaser is the owner of the property, subject to her liability to pay the balance of the purchase-money.]

Sect. 55 says that the trustee may disclaim any onerous or unprofitable contract of the bankrupt, and that is what this trustee has done.

[COLLINS L.J. Could the trustee refuse to deliver to a purchaser chattels the property in which had passed to him by appropriation before the bankruptcy?]

No; but in that case the property would have passed at law. In the present case the property has not passed at law.

[RIGBY L.J. It has passed in equity.]

A contract to take shares in a company may be disclaimed under s. 55: *In re Hooley.* (2) The Divisional Court followed the decision of Cozens-Hardy J. in *Pearce* v. *Bastable's Trustee in Bankruptcy* (3), and that of Cave J. in *In re Kerkham* (4); but those decisions do not bind this Court. The trustee is not a trustee of the property for the purchaser when only part of the purchase-money has been paid: *Ex parte Rabbidge.* (5) Specific performance cannot be enforced against a trustee in bankruptcy without his consent: Fry on Specific Performance, 3rd ed. p. 439. To the extent of the purchase-money paid the payment transfers in equity to the purchaser the ownership of a corresponding portion of the estate: *Rose* v. *Watson.* (6)

(1) (1885) 14 Q. B. D. 956.
(2) [1899] 2 Q. B. 579.
(3) [1901] 2 Ch. 122.
(4) (1886) 80 L. T. Journal, 322.
(5) (1878) 8 Ch. D. 367.
(6) (1864) 10 H. L. C. 672, 678, 684.

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The position of the purchaser is that of a secured creditor who has a charge or lien on the property for the amount which he has paid. The only difference between the legal position of a purchaser of land and his position in equity is that in equity there is a right to specific performance of the contract. That equitable right does not remain after the bankruptcy of the vendor; it is superseded by the rights of the other creditors of the bankrupt. The trustee in the bankruptcy is entitled to disclaim everything which is unprofitable and to retain that which is profitable.

Lord Coleridge, K.C., Bovill Smith, and *Joseph Ricardo*, for the purchaser. The object of s. 55 is to relieve the trustee from the obligation to pay money or to become subject to onerous covenants—in other words, to prevent the trustee from being in any way in a worse position by fulfilling the bankrupt's contract. The rights of third parties are preserved. In *Ex parte Holthausen* (1) James L.J. said (2) that "if a bankrupt, or a liquidating debtor, under circumstances which are not impeachable under any particular provision connected with his bankruptcy or insolvency, enters into a contract with respect to his real estate for a valuable consideration, that contract binds his trustee in bankruptcy as much as it binds himself."

[They were stopped by the Court.]

RIGBY L.J. I have felt some little difficulty about this case, but my learned brethren and I are now quite agreed, and I will leave them to state the grounds of our decision.

COLLINS L.J. The Divisional Court, reversing the decision of the county court judge, have held that the trustee in this bankruptcy is not entitled to disclaim the contract which he claims the right to disclaim. The circumstances are these. The bankrupt was the lessee of some houses, and he had agreed to sell one of them, and a sum of 50*l.* had been paid by the purchaser as a deposit. This leasehold house was subject to a mortgage, and by the contract a day was fixed for completion. The vendor was to pay all the outgoings up to that date, and

(1) (1874) L. R. 9 Ch. 722. (2) L. R. 9 Ch. at p. 726.

after that date the purchaser was to take over the property. After the sale the vendor became bankrupt, and the trustee, having considered the matter, was willing to treat the contract for sale as binding upon him if, as he said, it should turn out to be beneficial to the estate, and he claimed that the unpaid balance of the purchase-money should be paid to him. Some time afterwards it appeared that there were some outgoings to be paid which the purchaser claimed to deduct from the unpaid balance of his purchase-money. Thereupon the trustee refused to be bound by the contract for sale, and claimed the right to disclaim it under the Bankruptcy Act. The question for our decision is, whether this is the kind of transaction which is covered by s. 55 of the Act, which gives the trustee the right to disclaim onerous property of the bankrupt. When the words of that section, which must after all govern the question, are considered, I think it is perfectly clear that it was never meant to extend to such a transaction as this—a transaction in which a disclaimer would have the effect, not of getting rid of burdensome property in the hands of the bankrupt and of the trustee as representing him, but of divesting from a purchaser an interest which had already passed to him.

Now it seems to me that the key to the meaning of the section is the power which is given to the trustee to get rid of onerous property. [The Lord Justice read s. 55, and continued:—]

The words of sub-s. 2, which limit the operation of the section by providing that the disclaimer "shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person," seem to me to involve the cardinal idea that the right given is a right to get rid of onerous property—property subject to some burden. In the present case there is no such burden upon the property. The only suggestion made on behalf of the trustee as justifying his disclaimer is that the bankrupt's estate would be better off with the land than with the purchase-money of the land. It does not appear to me primâ facie that such a case falls within the provisions of s. 55, or that the contract is within the class of property to which it relates.

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But the matter does not stop there. This property is leasehold, and is therefore subject to certain covenants and obligations, and it may well be that the property itself is within the provisions of the section which give the trustee a right to disclaim. But the trustee does not seek to disclaim the leasehold property at all. What he does seek to disclaim, and asserts that he has a right to disclaim, is a contract for the sale of this leasehold property. He asserts that he is entitled to disclaim the contract, while he still adheres to and does not disclaim his interest in the lease. It seems to me that, as I have already said, a contract for sale is not included in the class of property to which this section refers.

But the matter does not rest there, because the subject-matter of the sale in this case is real estate, and such a contract of sale, whether followed or not by payment of a deposit, operates to pass to the purchaser an equitable interest in the land, and the effect of a disclaimer of the contract now would be not to relieve the trustee from a burden, but to divest and take out of the purchaser the property which is already vested in him. No doubt the section might have so provided; but is there anything in it even to suggest that it has so enacted? I have read the words, and I have pointed out what appears to me to be the key to their meaning. That section is not an isolated factor in the law of bankruptcy. It recognises, as it seems to me, an established principle in bankruptcy law which is well expressed in the judgment of James L.J. in *Ex parte Holthausen.* (1) He said (2): "The law of England is, that, with certain exceptions, the trustee in bankruptcy is bound by all the equities which affect a bankrupt or a liquidating debtor; that is to say, if a bankrupt or a liquidating debtor, under circumstances which are not impeachable under any particular provision connected with his bankruptcy or insolvency, enters into a contract with respect to his real estate for a valuable consideration, that contract binds his trustee in bankruptcy as much as it binds himself. It, therefore, appears to me that, if these debtors are bound, their trustee is also bound; and there is no suggestion whatever

(1) L. R. 9 Ch. 722.

(2) L. R. 9 Ch. at p. 726.

that, according to either the German law or anything known to the English law, if a man enters into a contract for valuable consideration that he will convey and assign certain property, and will do all necessary acts for conveying it, he could not be compelled, being solvent, to complete the contract according to the terms of it. The German lawyer does not suggest anything to the contrary, and I myself do not believe that there is any law in any civilised country in the world which says that any party to such a contract, properly evidenced, is not bound by it. If that is so, the debtors were personally bound by the contract at the moment when their liquidation commenced. They ought to have fulfilled it; and that a bill could have been filed against them in this country to have compelled them to fulfil that contract is beyond all question. In this country, in an English bankruptcy, the trustee stands exactly in the same position as the bankrupt himself stands in, and therefore his trustee is bound to perform the contract in exactly the same way as he himself was bound to perform it." It does not appear to me that this disclaimer section operates to alter those rights, or to give to the trustee a right to take out of a person an equitable interest which has passed to him by contract from the bankrupt, and thus to stand free of the equity already created by the bankrupt. I think the effect of the section is only that which is obvious from the cardinal words which I have read, namely, to enable the trustee to get rid of property which is subject to some burdensome obligation. The section does not extend to the present case, and therefore in my opinion the Divisional Court were perfectly right in refusing to allow the trustee, while holding the leasehold estate, to disclaim the contract for sale which had passed an equitable interest in the estate to the purchaser.

ROMER L.J. I agree. It is in substance contended on behalf of the trustee that if a vendor of real estate, by contract entered into with a purchaser, becomes bankrupt, the trustee in the bankruptcy of the vendor, without disclaiming the land or the interest in the land which was the subject of the contract, can, by disclaiming the contract alone, put himself in the

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position of owner of the estate freed altogther from the purchaser's interest in the estate, leaving the purchaser only the remedy of proving in the bankruptcy for any loss he may have suffered by having his contract destroyed. That would, indeed, be a serious contention if it could be maintained, because the result would be, that in every case in which an owner of real estate who had contracted to sell it subsequently became bankrupt, and after the contract of sale and before the bankruptcy the property had increased in value, the trustee in the bankruptcy would be able to deprive the purchaser of all interest in the estate and leave him merely the right to prove in the bankruptcy for any loss he might have incurred by the destruction of his contract, in which case he might possibly receive only an infinitesimal dividend upon the amount of his proof. It cannot, I think, be that such a result was ever intended by the Act. And indeed, when s. 55 is examined, it has, in my view, no such operation or effect. The fallacy of the argument for the appellant lies, I think, in ignoring the nature of the interest of a purchaser of real estate after a contract for its sale has been made between him and the owner of the estate. The purchaser has, then, something more than a pecuniary interest under his contract. He has an equitable interest in the land itself. Fortunately, it is not necessary for us now to investigate what the precise nature of that interest is, but it is an interest in the land—an interest which is assignable, which can be devised, and which, in the event of the purchaser dying intestate, would pass to his heir. That interest in the land would remain whatever might be the effect of a disclaimer by the trustee in the vendor's bankruptcy of the contract for sale.

Assume that the contract of sale could be disclaimed by the trustee in the bankruptcy separately and apart from any disclaimer by him of the property the subject of the contract. What, then, would be the effect under s. 55 of such a disclaimer? If the contract is to be regarded separately, apart from the trustee's interest in the land itself, what was the nature of the contract? Regarded separately, it is a contract under which the bankrupt's estate would be entitled to receive the balance of the purchase-money on conveyance of the property to the

purchaser. Dealing with it strictly, and assuming that such a contract could be separately disclaimed, what would be the effect of the separate disclaimer? The sole effect would be this. It would prevent the trustee from afterwards insisting that the purchaser was bound to pay to the bankrupt's estate the balance of his purchase-money. I can indeed imagine a case in which the disclaimer might have a further effect. For example, suppose under the contract of sale the vendor had agreed to do some act which would cast expense upon the estate, so that if the trustee had to carry out the contract as a whole he would have to carry it out at the expense of the estate. I have no doubt that in such a case a disclaimer would also free the estate from direct liability to expend that money or to perform the acts which the bankrupt had contracted to do. But in any case the disclaimer of the contract would operate to determine any right of the trustee thereafter to call upon the purchaser to pay any moneys or to do any other thing to perfect his interest in the land. A disclaimer of a contract under such circumstances under s. 55 cannot operate to destroy a third person's interest in property which existed before the disclaimer. No disclaimer by the trustee could in my opinion take away the equitable interest in the land which the purchaser had acquired under his contract. That interest remains, and the sole effect of the disclaimer of the contract by the trustee would be that the purchaser could say, "I have now this equitable interest in the land, and I am freed from the obligation of tendering or paying the balance of my purchase-money." That being so, what is the position of this purchaser? He has the right to this estate and an equitable interest in it subject to the mortgage, and subject to this—that the trustee has vested in him something in the nature of a legal estate. In a case of that kind it is the common practice of the Bankruptcy Court on the application of a person in that position to say to the trustee in the bankruptcy, "If you have no further interest in the property but an outstanding legal estate, your duty is to convey that estate to the purchaser if you do not disclaim the property." In substance I think that is what the Divisional Court have done. They have, and I think rightly, treated the

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purchaser's application as one calling upon the trustee either to disclaim the property, or, if he does not disclaim it, then to convey it to the purchaser. In form I think the order of the Divisional Court requires a little modification; but it is a modification in form only, and in my opinion it ought not to affect the costs either in this Court or in the Court below. Unless the trustee is prepared to disclaim the lease, or unless he now wishes to carry out the contract in the hope of being able to obtain payment of the balance of the purchase-money (I gather that the purchaser is still willing to pay that balance, if any balance be due, even although, after the separate disclaimer of the contract, it may be the trustee is not strictly entitled to call upon the purchaser to pay that balance), I think the proper course would be simply to order the trustee to convey the legal estate which is outstanding in him to the purchaser, subject of course to the existing mortgage. I think the trustee ought to state what course he will adopt, so that the order may be framed accordingly.

I wish to add this. Speaking for myself, I have noticed in this case, and in many other bankruptcy cases, how very small the subject-matter of the appeal is—how wholly disproportionate the value involved is to the costs incurred on the one side and the other. I cannot but regret that appeals should be so frequent in bankruptcy matters (as they are not in other matters) when the costs of the appeal are considerable and the amount involved is practically little or nothing. There seems to be a practice growing up in bankruptcy of appealing in regard to small matters involving no real principle of importance to the parties, and no substantial pecuniary interest. This is a practice which I regret to see.

Appeal dismissed.

Solicitors: *Ward, Perks & McKay; Seeley & Son.*

W. L. C.

THRELKELD, APPELLANT *v.* SMITH, RESPONDENT.

1901
June 17.

Criminal Law—Larceny—Deer—Deer usually kept in a Forest—Killing outside Forest—Unlawful Possession—Larceny Act, 1861 (24 & 25 *Vict. c.* 96), *ss.* 12, 14.

A person who kills and carries away a deer, usually kept in a forest, when it is outside of the limits of the forest and upon the land of a third person, cannot be convicted, under s. 14 of the Larceny Act, 1861, of being in unlawful possession thereof.

SPECIAL CASE stated by justices.

On March 4, 1901, an information, preferred against Threlkeld by Smith, the superintendent of police, under s. 14 of the Larceny Act, 1861 (1), was heard and determined by the justices of Westmoreland, who convicted Threlkeld and fined him 5*l.*

(1) 24 & 25 Vict. c. 96, s. 12: "Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the uninclosed part of any forest, chase, or purlieu, shall for every such offence, on conviction thereof before a justice of the peace, forfeit and pay such sum, not exceeding fifty pounds, as to the justice shall seem meet . . . ."

Sect. 13: "Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the inclosed part of any forest, chase, or purlieu, or in any inclosed land where deer shall be usually kept, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years. . . ."

Sect. 14: "If any deer, or the head, skin, or other part thereof, or any snare or engine for the taking of deer, shall be found in the possession of any person or on the premises of any person with his knowledge, and such person being taken, or summoned before a justice of the peace, shall not satisfy the justice that he came lawfully by such deer, or the head, skin, or other part thereof, or had a lawful occasion for such snare, or engine, and did not keep the same for any unlawful purpose, he shall, on conviction by the justice, forfeit and pay any sum not exceeding twenty pounds, and if any such person shall not under the said provisions be liable to conviction, then for the discovery of the party who actually killed or stole such deer, the justice, at his discretion, as the evidence given and the circumstances of the case require, may summon before him every person through whose hands such deer, or the head, skin, or other part thereof, shall appear to have passed; and if the person from whom the same shall have been first received, or who shall have had possession thereof, shall not satisfy the justice that he came lawfully by the same, he shall, on conviction by the justice, be liable to the payment of such sum of money as is hereinbefore last mentioned."

1901

THRELKELD v. SMITH.

J. E. Hasell was the owner of the uninclosed common and forest of Martindale, in which he kept a herd of wild red deer. Lord Lonsdale was the lord of the manor of Bampton, which adjoined Hasell's property and comprised a large uninclosed common.

On February 18, 1901, Threlkeld shot a deer, which had strayed from Hasell's herd in the forest of Martindale on to the common belonging to Lord Lonsdale, and carried it away and concealed it within the buildings of his farm.

On February 25 the police, acting under a search-warrant, found the body of the deer in the place in which Threlkeld had concealed it.

For Threlkeld it was contended that there was no case to answer upon the grounds: (1.) That deer being wild and unreclaimed belonged to the class of animals feræ naturæ; that any man may seize and keep for his own use animals feræ naturæ which have escaped from captivity; that the property in such animals is gone when off the owner's land even though driven off by a trespasser; and that, therefore, at common law there could be no larceny of a deer. (2.) That, therefore, the prosecution had to bring themselves strictly within ss. 12 and 13 of the Larceny Act, 1861, and that these sections did not apply to the case, the words "kept or being," used in those sections, not applying, inasmuch as the deer when killed was neither in the inclosed nor in the uninclosed part of a forest, chase, or purlieu. (3.) That the deer not being the subject of larceny at common law, and ss. 12 and 13 of the Larceny Act not applying, and Hasell having no property in the deer at the place where it was killed, Threlkeld had committed no offence against either the common law or any statute, and was therefore in lawful possession of the deer and entitled to be acquitted.

For the prosecutor it was contended that deer are not necessarily animals feræ naturæ, but, even if they are not the subject of larceny at common law, yet s. 14 of the Larceny Act, 1861, applied.

The justices were of opinion that Threlkeld had not satisfied

them that he came lawfully by the deer for the following reasons: (1.) He had not shewn that he had the right of shooting on the commons in the manor of Bampton; and (2.) He had unlawfully killed a deer "kept" in the uninclosed part of the forest, chase, or purlieu, within the meaning of s. 12 of the Larceny Act, 1861, there being a difference between the word "kept" and the word "being."

The question for the opinion of the Court was whether the justices were right in point of law in finding that the defendant had not satisfied them that he came lawfully by the deer.

T. Shepherd Little, for the appellant. The justices ought not to have convicted the appellant under s. 14 of the Larceny Act, 1861, because it was clear upon the facts of the case that he did satisfy the justices that he had come lawfully by the deer. The deer when it was killed was not a deer "kept or being in the uninclosed part of any forest, chase, or purlieu," within the meaning of s. 12, but was entirely outside the forest and upon the land of Lord Lonsdale. Therefore no offence was committed under s. 12 or under s. 13. Unless the deer was unlawfully killed in contravention of the provisions of s. 12 or s. 13, it could not be unlawfully in the possession of the defendant. It would not be unlawfully in his possession, within the meaning of s. 14, merely because it was killed upon the land of some one else: that would only give rise to a civil remedy, and the act would not be unlawful, within the meaning of s. 14, merely because it was a civil wrong: *Reg.* v. *Roe* (1); *Reg.* v. *King*. (2)

Danckwerts, K.C., for the respondent. The deer in question, when it was killed by the appellant, was a deer "kept or being" in an uninclosed forest, within the meaning of s. 12. The word "kept" is not confined to deer which are actually within the forest, but means deer which are usually kept within a forest, though they may have strayed out of the forest: the word "being" is used to describe deer while they are within the forest, and the word "kept" must have a wider meaning.

(1) (1870) 11 Cox C. C. 554. (2) (1843) 13 L. J. (M.C.) 43.

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If the act of the appellant in killing the deer was an offence under s. 12, he could not be held to have come "lawfully" by the deer, within the meaning of s. 14. Even if he did not commit an offence under s. 12, yet he did not lawfully come by the deer, within the meaning of s. 14, because he killed it upon the land of Lord Lonsdale, whose property it became, and his act was unlawful: *Davies* v. *Powell* (1); *Blades* v. *Higgs*. (2)

Little, replied.

RIDLEY J. This case raises a question of a somewhat intricate character, although the facts are simple. The appellant was convicted by the justices under s. 14 of the Larceny Act, 1861, they holding that he had not under the circumstances satisfied them that "he came lawfully by such deer," within the meaning of s. 14. The facts which give rise to the difficulty in this case are as follows: The deer in question was proved to have been one of a herd of deer kept within the forest of Mr. Hasell, which had escaped from the forest and was killed by the appellant outside the boundaries of the forest upon land belonging to Lord Lonsdale. The land upon which the deer was killed was not the land of the appellant, and therefore he cannot set up any right that the deer belonged to him. The question is whether, under those circumstances, the justices ought to have found that the appellant had satisfied them that "he had lawfully come by such deer," within the meaning of s. 14. That question depends upon the construction of certain sections of the Larceny Act, 1861; but I will first of all state what I believe to be the law with regard to forests. I believe that any offences committed within forests, as they existed or were made by the early Norman kings, were treated as capital offences, or were punished severely if the punishment fell short of death. By a series of statutes passed from time to time the severity of those laws was mitigated. That being so with regard to offences in respect of animals feræ naturæ committed within the limits of a forest, those offences were confined to the limits of a forest. There were, indeed, certain boundaries which were wider than the forest, which included

(1) (1737) Willes, 46. (2) (1865) 11 H. L. C. 621.

what would be called the outskirts of the forest. Within those outskirts there were wider rights belonging to those who held the land. The law is, I believe, correctly stated in Coke's Institutes, bk. 4, ch. 73, where it is said that "when the king's game of the forest do range out of the forest (and purlieu, if any be) they belong not to the king, but are at their natural liberty, et occupanti conceduntur." I think that "occupanti conceduntur" means that the person who found them might make himself possessed of them. Assuming, however, that it does not mean that, but that the occupier of the land may kill and take them, it seems to me to shew that the rights of the forest ceased at the limits of the purlieu; that those rights were local and did not extend further. A person who killed one of those animals outside the forest did not break the laws of the forest; he may have broken the civil law by taking an animal which did not belong to him, but he was not subject to criminal proceedings. Within the purlieus there were certain other rights which the owner possessed, which are stated in Manwood's Forest Laws and in Comyn's Digest, tit. Chase, I. It appears that within the forest the right of the owner was absolute, that within the purlieu he had a qualified right; and that outside the purlieu he had no right at all as the owner of the forest. That was the law, I believe, as it anciently existed. That law has been gradually altered by statutes, the last of which is the Larceny Act, 1861, which we have now to construe. I will first mention s. 10 of that Act, which deals with the stealing of domestic animals, and makes that an offence punishable with penal servitude. Then s. 11 provides that "whosoever shall wilfully kill any animal with intent to steal the carcase . . . . shall be guilty of felony," and be liable to the same punishment as under s. 10, if the offence of stealing the animal would have amounted to a felony. That has no application to s. 12, which immediately follows, although it might be argued that it applies to s. 13, which makes it a felony to kill deer in the inclosed part of a forest. It is not, however, necessary to decide that point, for the proceedings in this case are not taken under s. 12 or s. 13. Then the statute goes on to deal with deer, and we have to consider the question whether

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ss. 12–16 are to be read together as a code to be construed with regard to the previous law upon the subject, or whether these are new provisions which are to be construed without regard to the previous law, and to receive a wider meaning than they would otherwise receive. According to the one interpretation, it would be unlawful to do that which the appellant did in this case—that is, to kill outside the limits of a forest a deer which was usually kept within a forest. According to the other interpretation, it would not be unlawful, because the deer was not killed within the limits of a forest. Now, which is the correct interpretation? Is it to be supposed that this Act intended to make criminal an act which previously would not have been so treated? I would hesitate long before accepting that contention. It seems to me that it is not probable that it was intended that persons who killed deer which had escaped from a forest should be treated as though they had done it within the forest. It seems to me that some light has been thrown upon the meaning of "unlawfully" in the Act by the difference between the sections, which make it universally an offence to kill domestic animals, and s. 12, which does not make it universally an offence to wilfully kill deer. Up to the time of the passing of this Act it was, as I have said, not unlawful, in the sense of being criminal, to kill deer outside certain boundaries. The word "unlawfully" seems to me to indicate that there may be circumstances under which it might be lawfully done within a forest. That being so, may not the word "unlawfully" be sufficiently and properly explained in that way? That word refers to the killing of a deer in a place where it is not lawful to do it. Then the words "any deer kept or being in an uninclosed part of any forest, chase, or purlieu" have to be interpreted. It has been argued that all of those words must be explained, and that, as the word "being" is used, a wider meaning must be given to the word "kept," so as to include deer which are usually kept in the forest but have escaped. Those words can, however, be read in a different sense—that is, that the statute protects the boundaries of a district analogous to an ancient forest, and not the rights of any particular person; that it protects both the

animals which are usually kept there and those which happen to stray there. If that is a competent construction of these words, it seems to me that this section may have a narrower interpretation than that for which the respondent contends. Now, having regard to the previous law on the subject, I think that that is a proper interpretation of s. 14, and that the narrower construction is the best one. Then comes s. 13, which relates to deer in an inclosed forest, which we need not consider. Then comes s. 14, the one now in question, which provides that if any deer shall be found in the possession of any person or on his premises with his knowledge, and he does not "satisfy the justices that he came lawfully by such deer," he may be convicted and fined. For the respondent it was forcibly argued that the appellant was not lawfully in possession of the deer, and that the justices could not find that he was, because the deer belonged to Lord Lonsdale under the rule of law that the owner of the land has the right to animals feræ naturæ which are on the land, and that no person has a right to kill them and say that they are his without the permission of the owner of the land. Is the word "lawfully" in this section used in that sense? It seems to me that it is not. I think that, having regard to s. 12, it is used in the same sense as "unlawfully" in s. 12. Therefore, if the person found in possession of the deer can shew that he had killed it outside the limits of a forest protected by s. 12, I think that he shews that he came by it "lawfully" within the meaning of s. 14. The following sections, ss. 15 and 16, seem to be supplemental sections. They deal with attempts to kill deer, and with persons who set snares or enter into a forest with intent to hunt deer. During the argument some stress was laid upon the use of the words "if any person shall enter into any forest" in s. 16. Under that section no person can be convicted unless he has done something within the forest, chase, or purlieu, whether inclosed or not, and I think that furnishes an argument in favour of our view rather than in favour of the contrary view, and shews that all these sections are intended to protect that particular place which is limited by the boundaries of the forest, chase, or purlieu. For these reasons I have come to the

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conclusion that the justices were wrong, and that they ought to have found that the appellant was lawfully in possession of the deer.

BIGHAM J. I am of the same opinion. The respondent supports this conviction, first, by saying that s. 14 is of general application, and is not to be read with exclusive reference to the offences created by ss. 12 and 13. In my opinion that contention is not sound. Having regard to the position of s. 14 in the Act, coming as it does after the two sections which make it an offence to kill deer, and before the two sections which do not relate to the offence of killing, I have no doubt that s. 14 intends, when it says that a person shall be convicted unless he shall satisfy the justices that he came lawfully by the deer, that the person charged shall not be convicted if he satisfies the justices that an offence has not been committed under s. 12 or s. 13. In my opinion he could say that he came lawfully by the deer, within the meaning of s. 14, if he shewed that no offence had been committed under s. 12 or s. 13. I think that any other construction would lead to absurd consequences, for it would make any person who happened to be in possession of any part of a deer liable to have an information laid against him under s. 14. I think that s. 14 is intended to apply only to a person who is in possession of any part of a deer and cannot shew that an offence has not been committed in respect thereof under s. 12 or s. 13. Then it is contended that, even if s. 14 is to be construed as having that narrow application, still it appears from the facts of this case that the appellant was guilty of the offence dealt with by s. 12, because the deer which he killed was "kept" in the forest. This deer was one which, in a sense, was at one time kept or was in the uninclosed part of a forest, and would, therefore, appear to be a deer which, while it was there, came within s. 12. Now s. 12 provides that "whosoever shall unlawfully and wilfully . . . . kill any deer kept or being in the uninclosed part of any forest" may be convicted and fined. The first question is whether the appellant did "unlawfully" kill this deer. What does "unlawfully" there

mean? For the respondent it is contended that "unlawfully" there means in such a way as to violate the private rights of an individual, and that the appellant in killing this deer did violate the private rights of Lord Lonsdale. I will assume that he did do so; but in my opinion that does not make his act unlawful within the meaning of s. 12. Probably it has always been contrary to the criminal law to "course, hunt, snare, or carry away, or kill, or wound" any deer in a forest. From time to time statutes have defined the punishment for that offence. Those statutes have from time to time been repealed and replaced by other statutes, and the last of those statutes is the Larceny Act, 1861. Sect. 12 does not create the offence, but refers to it as an existing offence, and I think as an existing common law offence. What, then, does s. 12 mean? It means that, if any person violates the criminal law by doing this act, he shall then be liable to the prescribed punishment. I interpret the adverb "unlawfully" as used in s. 12 to mean, not in contravention of the rights of a private individual, but in contravention of the criminal law of the land. I think that the appellant did not commit any unlawful act in that sense. He killed an animal feræ naturæ at a time when he was not committing any crime. He was possibly violating the rights of Lord Lonsdale, but he was not doing anything more, and, therefore, was not, in my opinion, acting "unlawfully" within the meaning of s. 12. The next question is whether this deer, at the time when it was killed, was "kept or being" in the forest, within the meaning of s. 12. It certainly was not in any part of the forest, for it had escaped and was in the manor of Bampton. It is argued, however, that although it was not in the forest, it was "kept" in the forest. Now, in my opinion, s. 12 refers only to acts done in the forest itself, and does not refer to anything done outside of the limits of the forest, chase, or purlieu. I think that s. 12 means that the act must be done in the forest, and that it is a criminal act if done there in respect of an animal which is either kept there by the owner of the forest, or happens to be there. I can put no other construction upon the words "kept or being." I am of opinion, therefore, that the act done by

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the appellant was not, under the circumstances, done "unlawfully" within the meaning of s. 12, and that his act was not an offence within this statute, because it was not done in a forest, chase, or purlieu, and also because this deer was not at the time "kept or being" in a forest. The conviction was, therefore, wrong. I may add that, in my opinion, the decision in *Reg.* v. *King* (1) involves the conclusion that this offence cannot be committed except within the limits of a forest, because it was held in that case that the conviction was bad for omitting to state that the deer was in the uninclosed part of some forest, chase, or purlieu.

Appeal allowed. Conviction quashed.

Solicitors for appellant: *Edwards & Sons, for Scott & Allan, Penrith.*

Solicitors for respondent: *Bleaymire & Shepherd, Penrith.*

P. B. H.

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June 20.

MATTHEWS, APPELLANT *v.* STRACHAN, RESPONDENT.

Local Government—Drainage—Effectual Drainage of New House—Separate Drains for Sewage and Surface Water—Discretion of Urban Council—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 25.

In deciding what is "necessary for the effectual drainage" of a new house, under s. 25 of the Public Health Act, 1875, an urban council must consider only what is necessary for the particular house in question; they cannot take into consideration what is desirable having regard to the disposal of the sewage of the district generally, and upon that ground require separate drains for sewage and for surface water.

CASE stated by justices.

On March 20, 1901, Strachan, as clerk to and on behalf of the urban district council of Harrow-on-the-Hill, laid an information against H. R. Matthews for that Matthews had newly erected a house in Lyon Road within the urban district without constructing such covered drains thereto as on the report of the surveyor of the council appeared to the council necessary for

(1) 13 L. J. (M.C.) 43.

the effectual drainage of the house, contrary to s. 25 of the Public Health Act, 1875. (1)

Matthews erected the house in question between August and December, 1900. Two sewers had been laid by the council in Lyon Road, both within 100 feet of the site of the house. One of these sewers, called the surface-water sewer, the council desire and intend to be used for the reception and conveyance of surface water only; the other, called the sewage sewer, the council desire and intend to be used for the reception and conveyance of sewage only.

By-laws, relating (inter alia) to the drainage of buildings, made under s. 157 of the Public Health Act, 1875, are in force in the district of the council. These by-laws do not require that separate drains for surface water and sewage respectively shall be laid for any building. On January 22, 1900, regulations were issued by the council, purporting to be made under s. 21 of the Public Health Act, 1875, with reference to the mode in which communications between drains and sewers are to be made. One of these regulations purports to prohibit surface water from being permitted to enter the sewers of the council without the special sanction of the council.

Before erecting the house Matthews deposited plans thereof, in accordance with the requirements of the by-laws, shewing the method proposed to be adopted, and afterwards in fact adopted by him, for the drainage of the house, namely, by means of a single drain which he proposed to connect with the

(1) 38 & 39 Vict. c. 55, s. 25: "It shall not be lawful in any urban district newly to erect any house or to rebuild any house which has been pulled down to or below the ground-floor, or to occupy any house so newly erected or rebuilt, unless and until a covered drain or drains be constructed, of such size and materials, and at such level, and with such fall as on the report of the surveyor may appear to the urban authority to be necessary for the effectual drainage of such house; and the drain or drains so to be constructed shall empty into any sewer which the urban authority are entitled to use, and which is within one hundred feet of some part of the site of the house to be built or rebuilt; but if no such means of drainage are within that distance, then shall empty into such covered cesspool or other place, not being under any house, as the urban authority direct.

"Any person who causes any house to be erected or rebuilt or any drain to be constructed in contravention of this section shall be liable to a penalty not exceeding fifty pounds."

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sewage sewer and intended to use for the discharge both of the surface water and of the sewage.

The surveyor of the council then made a report to the council, with reference to the drainage of the house, as follows: "As instructed, I beg to present my report. The requirements for the effectual drainage of this house are as follows: (*a*) One main drain of not less than four inches internal diameter for conveying sewage only, to be constructed of good sound stoneware pipes or other equally suitable material and connected to the council's sewage sewer in Lyon Road . . . . To this main drain must be connected with suitable four-inch pipes the soil-pipe taking the water-closet on the first-floor; also the drain taking the water-closet on the ground-floor. The lavatories, bath, and scullery waste-pipes must discharge in the open air over trapped gulley gratings, which gullies must be connected to this main sewage drain . . . . (*b*) One main drain of not less than four inches internal diameter for conveying surface water only to be constructed of good sound stoneware pipes or other equally good material . . . . which drain is to be connected with the council's surface-water sewer in Lyon Road. To this drain must be connected the whole of the rain-water pipes or gullies which carry the surface water from the roof or roofs."

On November 26, 1900, the council took that report into consideration, and, after considerable discussion, passed a resolution "that the council approve the plans submitted by Mr. H. R. Matthews, subject to the requirements contained in the above report as to drainage of the house being carried out." On November 27 the clerk to the council forwarded to Matthews, by the direction of the council, a copy of the report of the surveyor, together with a letter, as follows: "I am now directed by my council to inform you that they have received a report from their surveyor, a copy of which is inclosed herewith, specifying what drains are necessary for the effectual drainage of the house now in course of erection by you in Lyon Road, and the council call upon you to lay the drains in accordance with that report. I am also directed to state that the council have taken counsel's opinion upon the matter, and

are advised that they have power under s. 25 of the Public Health Act, 1875, to prescribe what drains are necessary for the effectual drainage of your house, and to what sewers the drains shall be connected. The council approve the plans deposited by you, subject to the requirements contained in such report as to the drainage of the house being carried out."

Matthews did not lay two drains for the drainage of the house as required by the said notice and report, but laid one drain only in the manner shewn on the deposited plans. That drain was in all respects in accordance with the requirements of the report as regards the conveyance of sewage; but no separate drain was laid for the conveyance of surface water, the surface water being conveyed to the soil drain in direct contravention of the requirements of the council.

The surveyor gave evidence at the hearing of the information. He admitted that the drain laid by Matthews would have been perfectly effectual if there had been only one sewer in Lyon Road, and that his reason for reporting that separate drains ought to be laid, one for sewage only and one for surface water, was that it was desirable, with a view of facilitating the ultimate disposal of sewage by the council, that sewage only should be discharged into the sewage sewer and surface water only into the surface-water sewer, and that there were separate sewers for sewage and for surface water in Lyon Road.

It was contended for Matthews, (*a*) that the powers of the council, under s. 25 of the Public Health Act, 1875, do not extend to requiring separate drains for surface water and sewage respectively to be laid for a house; (*b*) that in exercising their powers under the section the council must confine themselves to a consideration of what is necessary for the effectual drainage of the house, and cannot require the laying of drains not necessary for that purpose, but required or desirable for facilitating the ultimate disposal of sewage by the council; (*c*) that the requirements of the council under the section must be confined to the size, level, materials, and fall of the drain or drains to be constructed, and cannot extend to other matters connected with the drainage of the house; (*d*) that the report of the council's surveyor was not a report upon which the

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council could act under the section, inasmuch as, in the first place, the report was not an expression of the opinion of the council's surveyor as to what was necessary for the effectual drainage of the house, but as to what was necessary or desirable for the purpose of facilitating the ultimate disposal of sewage; and, in the second place, the report was not confined to the size, level, materials, and fall of the drain or drains to be constructed, but extended to other matters.

It was contended by the respondent that, the surveyor having made the report to the council, and the council having in fact taken the report into consideration and passed a resolution that the drains specified in the report appeared to the council to be necessary for the effectual drainage of the house, and having given notice of that resolution to Matthews, the justices were bound, in the absence of any evidence that the council had not fairly considered the facts of the particular case, to convict, upon it being found that Matthews had not complied with the notice.

The justices held that, under these circumstances, they had no power to question the reasonableness of the requirements for the effectual drainage of the house, either as regards the house itself only, or in connection with the general system of drainage in the district, and convicted Matthews. The question for the opinion of the Court was whether, upon these facts, the justices came to a correct determination in point of law.

A. F. Jenkin (*McCall, K.C.*, with him), for the appellant. The provisions of s. 25 give to the local authority an absolute discretion, without any appeal, in respect of the matters within their jurisdiction under that section. The section gives the local authority power to decide what is necessary for the effectual drainage of a house only in respect of the particulars which are there enumerated—that is, size, materials, level, and fall. The local authority has no power under the section to take into consideration the requirements of the district generally with regard to the disposal of sewage, or to consider what is desirable having regard to their general system of sewerage.

They can only consider what is necessary, in respect of size, materials, level, and fall, for the effectual drainage of the particular house in question. There is no power to require two drains if one will be sufficient, or to direct that the drain or drains shall empty into a particular sewer if there is more than one sewer within 100 feet of the house. If the council wish to enforce separate drainage of sewage and surface water, they must make by-laws, under s. 157 of the Act, for that purpose with the consent of the Local Government Board, and persons interested will have an opportunity of making objections to those by-laws. It is clear from the report of the surveyor, and from his evidence, that the council took into consideration matters which they had no right to consider; and, therefore, they acted beyond their jurisdiction in making the requirements which they made in this case.

S. G. Lushington (*Macmorran, K.C.*, with him), for the respondent. Under the Public Health Act, 1875, the local authority have coexisting powers under s. 157 and under s. 25 in respect of the drainage of houses, and they can properly exercise the powers conferred by s. 25 in respect of matters which are not dealt with by by-laws under s. 157. By s. 25 it is left entirely to the discretion of the local authority to say what is necessary for the effectual drainage of a new house; the section says "drain or drains," and therefore there is power to require more than one drain. If the council have exercised their discretion under s. 25, their action cannot be reviewed in any Court if there has been no misconduct on their part: *Smith* v. *Chorley District Council.* (1) In this case there is no evidence that the council took into consideration any other matters than those specified in s. 25, and the reasons which may have influenced the surveyor in making his report do not in any way affect the validity of the action of the council in the exercise of their discretion. There is no suggestion of any improper conduct on the part of the council.

RIDLEY J. We think that the decision of the justices in this case was wrong. The question arises upon s. 25 of the Public

(1) [1897] 1 Q. B. 532.

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Health Act, 1875. The appellant, the builder and owner of a house within the district of the urban council, was convicted of erecting the house without the drains necessary for the effectual drainage of the house under that section. The surveyor of the council had made a report to the council which states upon its face that "The requirements for the effectual drainage of this house are, (*a*) one main drain of not less than four inches internal diameter for conveying sewage only . . . . connected to the council's sewage sewer in Lyon Road; (*b*) one main drain . . . . for conveying surface water only . . . . to be connected to the council's surface-water sewer in Lyon Road."

Now, there is no evidence of what was before the council, besides the report, when the matter was considered by them and they resolved to act upon the report. Before the justices, however, the surveyor gave evidence and made most material admissions. He admitted that the single drain would have been perfectly effectual if there had been only one sewer, and that his reason for reporting that separate drains ought to be laid, one for sewage only and one for surface water, was that it was desirable with a view of facilitating the ultimate disposal of sewage by the council that sewage only should be discharged into the sewage sewer, and surface water only into the surface-water sewer.

I think that we must take that as a statement of the real facts of this case. I think that probably the notice of the urban council was not called to those facts, and that they acted upon the report of their surveyor alone. That report was founded upon a misconception, and the surveyor acted beyond the power conferred by s. 25. I think that s. 25 relates only to the requirements as to size, materials, level, and fall of the drain or drains necessary for each particular house, and that, if the council and their surveyor go beyond those requirements and ask the owner of a house to do more than is required by the section for the effectual drainage of his house, they are in effect asking him to subscribe to the expenses of a general system of sewerage for the district. Now the surveyor said that he reported that two drains were necessary because it was

desirable to have two in view of the system of sewerage and of the fact that there were two sewers.

Does s. 25 contemplate that reasons of that kind should be taken into consideration when the urban council are considering what drains are necessary for the effectual drainage of the house? The council are the masters of the situation, and their discretion, exercised within the limits of the power given by s. 25, cannot be questioned; but, if they go beyond the limits of the power conferred on them by s. 25, the Court has power to say that they have done so. Sect. 25 provides that it shall not be lawful to erect any house "unless and until a covered drain or drains be constructed of such size and materials, and at such level, and with such fall as on the report of the surveyor may appear to the urban authority to be necessary for the effectual drainage of such house." It appears to me that those words have been carefully selected in order to shew that the matters which are to be considered in respect of the effectual drainage of the house are the size, materials, level, and fall of the drains. The section then proceeds: "and the drain or drains so to be constructed shall empty into any sewer which the urban authority are entitled to use," and which is within 100 feet of the house. More than one drain may sometimes be necessary because the particular house requires more than one, and it may sometimes be desirable to have more than one drain for the effectual drainage of the house, and to have separate connections with more than one sewer which is within 100 feet of the house. If that is necessary for the requirements of the particular house, it is not beyond the power of the urban council to require the drains to be so constructed. If that were all that was done in the present case, I could not say that the council had gone beyond their power. If, however, they considered the benefit of the district generally in respect of their system of sewage disposal, that does not come within s. 25, which only gives them the power to make the owner of each house provide the drains which are necessary for the effectual drainage of his own house. When the owner has done that, it is the duty of the council to dispose of all the sewage at the expense of the district.

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Ridley J.

It has been contended for the respondent that, under s. 157, the council has no power to make by-laws with respect to this matter. I doubt that very much. That section gives the local authority power to make by-laws "with respect to the drainage of buildings," and I think that under that power the council could make by-laws upon this matter with the consent of the Local Government Board, in which case the residents in the district would have an opportunity of objecting to the making of those by-laws. I base my judgment, however, upon the construction of s. 25. This appeal must be allowed.

BIGHAM J. I am of the same opinion. Sect. 25 empowers the urban council to take into consideration certain matters only for the purpose of satisfying themselves whether drains are effectual for the drainage of a house. These matters mentioned in the section are the size, materials, level and fall of the drains. Those are the only matters which the council are entitled to consider. If the council in their discretion find that these matters are as they should be, then the new house may be lawfully erected. In my opinion the urban council have, however, in the present case considered other matters, and I arrive at that conclusion upon reading the report of their surveyor, upon which the council acted. It is said that there is no evidence that the council considered any matter which they were not entitled to consider. They had the report before them, and that report in my opinion shews that both the surveyor and the council took into consideration matters which they had no right to consider. The surveyor in his report says that the requirements for the effectual drainage of that house are, "(*a*) one main drain . . . . connected with the council's sewage sewer," and "(*b*) one main drain . . . . to be connected with the council's surface-water sewer." In my opinion the surveyor had no business to consider the matter of the connection of the drains. When one remembers all the facts and circumstances, one sees clearly what was taken into consideration. There was a system of sewerage in the district by which the sewage and the surface water were kept separate in separate sewers. It was desirable, no doubt, that this system should be

carried out effectively, but the cost of that system could not be imposed in any way upon the individual householder whose property had to be drained; that system must be carried out at the expense of the ratepayers at large. In this case an attempt has been made to throw part of the cost of the general system upon an individual householder. That cannot be done under the power conferred by s. 25. I am satisfied from the report of the surveyor that the council, in the exercise of their discretion under s. 25, travelled outside of the matters which they were entitled to consider. The surveyor in his report goes on to say that to the main drain for conveying sewage must be connected the soil-pipes and lavatories, bath and scullery waste-pipes, and to the main drain for surface water must be connected the whole of the rain-water pipes, and that the one drain must empty into the sewage sewer and the other into the surface-water sewer. I can see nothing in s. 25 which gives to the local authority any power to give those directions. If a sewer is within 100 feet of the house, that is sufficient, and the householder is entitled to drain into it, and the local authority has no power to consider into what sewer, if there is more than one within 100 feet, the drains shall empty. It is sufficient, under s. 25, if the drains do empty into a sewer. I do not think that the words "into any sewer" can in any way enlarge the power of the local authority to require effectual drainage of a house under s. 25. Here the council have taken into consideration matters which they had no power to consider, and have acted beyond the power conferred by s. 25.

Appeal allowed. Conviction quashed.

Solicitors for appellant: *Burgess & Taylor.*
Solicitors for respondent: *Fishers.*

P. B. H.

C. A.

1901

June 18, 19; *July* 1.

[IN THE COURT OF APPEAL.]

CARRITT *v.* BRADLEY AND ANOTHER.

Mortgage—Clog on Redemption—Mortgage of Shares in Company—Stipulation that Mortgagee shall be employed as Broker by the Company.

In consideration of an advance of money to the defendant by the plaintiff, the defendant, who was the holder of shares in a tea company to an amount which gave him a preponderating voice in the affairs of the company, mortgaged those shares to the plaintiff to secure the advance, and agreed that always thereafter he would use his best endeavours to secure that the plaintiff should be employed for the sale of the company's teas as broker, and, in the event of any of the company's teas being sold otherwise than through the plaintiff, he would pay to the plaintiff the amount of the commission which the plaintiff would have earned if the teas had been sold through him:—

Held, that this agreement was not invalid as being a clog upon the equity of redemption in the shares.

APPLICATION by the defendants for judgment or a new trial in an action tried by Bigham J. with a jury.

The action was against the defendants, William McKenzie Bradley and James Bradley, for breach of agreements entered into with the plaintiff by them respectively. The defendant, W. M. Bradley, was, at the time when the agreements were entered into, the holder of shares in a company called the Sephinjuri Bheel Tea Company, Limited, to an amount which gave him a preponderating voice in the affairs of the company. The effect of the agreements was that, in consideration of an advance made by the plaintiff to the defendant W. M. Bradley, which was secured by a mortgage to the plaintiff of W. M. Bradley's shares in the company, the defendants agreed that they would respectively use their best endeavours to secure that the plaintiff should always thereafter be employed as broker for the sale of the company's teas, and that, in the event of any of the company's teas being sold otherwise than through the plaintiff, the defendants respectively would pay to him the amount of the commission which he would have earned if the teas had been sold through him.

The terms of the contracts entered into with the plaintiff by the defendants respectively and the facts are fully stated in the judgment.

The verdict was for the plaintiff and judgment was entered accordingly.

June 18, 19. *Dickens, K.C.*, and *Montague Lush*, for the defendants. The true construction of the agreement, having regard to the circumstances under which it was entered into, is that the stipulation that the plaintiff shall be employed as broker for the company was only intended to apply to the period during which the loan and the mortgage security continued. The generality of the expression "always hereafter" must be qualified by reference to the subject-matter. By the terms of the agreement the loan might continue only for a period of about a year, and it cannot have been intended that, if the loan were then called in, the obligation to retain the plaintiff as broker for the company should continue for the rest of his life.

If the construction of the agreement be that the stipulation that the plaintiff should be employed as broker was to apply for an indefinite period, although the loan were called in, then the case falls within the rule of equity which invalidates stipulations by which the equity of redemption of property mortgaged or charged is clogged. The principle of the rule of equity on that subject is that, in the case of mortgage transactions, the borrower must, upon payment of the loan and all interest due, be placed in the same position with regard to the mortgaged property as before the mortgage. The mortgagor is entitled to have the mortgaged property restored to him, unfettered and undiminished in value. It is not necessary that the stipulation in question should directly affect the property itself; any collateral covenant or stipulation which would affect its value to the mortgagor after redemption is inadmissible: *Rice* v. *Noakes* (1); *Marquess of Northampton* v. *Pollock* (2); *Salt* v. *Marquess of Northampton*. (3) The effect of the stipulation

(1) [1900] 2 Ch. 445. (2) (1890) 45 Ch. D. 190.
(3) [1892] A. C. 1.

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in this case would be to diminish the value of the defendant's shares to the defendant. If he sold the shares, he must either sell them taking a covenant from the purchaser to vote for the retention of the plaintiff as broker to the company, in which case he would not get so much for them, or, if he sold them in the ordinary way without any such covenant, he would be liable to pay to the plaintiff, if he ceased to be employed as broker, the amount which he would have earned as brokerage, if he had continued to be employed as broker for the rest of his life. Any collateral stipulation which is to continue after redemption is within the doctrine of equity on this subject. It is submitted that the reason why in *Biggs* v. *Hoddinott* (1) the collateral stipulation was held valid was because on the construction of the contract it was held to be limited to the period during which the security continued. In *Santley* v. *Wilde* (2) the mortgage was held to be a security for the payment of a share of the profits of the theatre during the term as well as for a sum advanced by the mortgagee, and therefore it was not a case of a stipulation clogging the right of redemption after performance of the obligation for which the security was given. In no case has it been held that a collateral stipulation is valid which would diminish the value of the mortgaged property or fetter the mortgagor in dealing with it after the performance of the obligation for which the security was given.

[They also cited *James* v. *Kerr* (3); *Mainland* v. *Upjohn*. (4)]

The obligation of the defendant James Bradley is really and in substance as surety for the defendant W. M. Bradley, and therefore his liability depends on that of W. M. Bradley.

J. A. Hamilton, K.C., and *Dawson Miller*, for the plaintiff. It is impossible to construe the stipulation that the plaintiff should be employed as broker to the company as confined to the period of the continuance of the security. There is no ambiguity in the terms of the agreement, which plainly import that the employment of the plaintiff as broker to the company was to continue after the security was at an end.

(1) [1898] 2 Ch. 307.
(2) [1899] 2 Ch. 474.
(3) (1889) 40 Ch. D. 449.
(4) (1889) 41 Ch. D. 126.

Secondly, there is no objection to such a stipulation on the ground that it clogs the equity of redemption. This stipulation is not one for a collateral advantage which would affect the mortgaged property after redemption. It is not really part of the security at all, but a part of the consideration for the making of an advance. It would be a perfectly good stipulation as part of the consideration for an advance if there had been no security by way of mortgage of property. How can it be rendered invalid, because there happens to be a security given for the advance? It is submitted that there is no case which shews that a mortgagee must not stipulate for any collateral advantage which may extend beyond the period of the security. There are cases where a stipulation for a collateral advantage has been disallowed on the ground that there was oppression or where a mortgagee had taken advantage of the position of a mortgagor, and the parties were held by a Court of Equity not to have contracted on equal terms, or where there had been a contravention of the laws against usury. But this case does not come within any of those classes. Again, there have been cases where a stipulation which affected the mortgaged property itself after redemption has been disallowed. But the stipulation now in question does not affect the saleable value of the defendant's shares in the smallest degree. The fact that, if he sells the shares, he may become unable to perform the stipulation, and consequently liable for breach of it, does not affect the value of the shares in the sense necessary to constitute a clog upon the equity of redemption. If, as in *Santley* v. *Wilde* (1), this agreement had been framed so as to make the shares a security for the performance of the stipulation as well as the repayment of the advances, it is not disputed that such an agreement would have been valid. In *Rice* v. *Noakes* (2) the covenant did affect the property; it was provided expressly that it should run with the land, and no one taking with notice of it could have carried on business on the premises in contravention of it.

Montague Lush, in reply.

Cur. adv. vult.

(1) [1899] 2 Ch. 474.

(2) [1900] 2 Ch. 445.

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July 1. The judgment of the Court (A. L. Smith M.R., Vaughan Williams L.J., and Stirling L.J.) was read by

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STIRLING L.J. This is an action, the object of which (so far as it is material to state it) is the recovery of damages from the defendants, W. M. Bradley and James Bradley, for breach of two agreements, both dated May 16, 1892. The defendant W. M. Bradley was at that date the holder of a large number of shares in a company named the Sephinjuri Bheel Tea Company, and by virtue thereof had a controlling interest in the company. The defendant James Bradley is his brother. The plaintiff carries on business as a tea broker, and at the same date acted as broker for the sale of the company's teas. In May, 1892, the defendant W. M. Bradley was desirous of obtaining a loan on the security of his shares in the company, and through his brother, the defendant J. Bradley, applied to the plaintiff to make him an advance. After some negotiations the plaintiff advanced to the defendant 2250*l.*, upon the defendants' respectively executing the following documents: "Thomas Carritt, Esq., 130, Fenchurch Street, E.C. Dear Sir,—In consideration of 2250*l.* this day advanced by you to me—1. I undertake to repay to you the said sum of 2250*l.* on or before June 30, 1893, together with interest thereon until repayment at the rate of 7 per cent. per annum, payable quarterly on June 30, September 30, December 31, and March 31, the first payment to be made on June 30 next. 2. As security for the repayment of the said loan and interest, I herewith hand you (1.) my promissory note payable on demand to your nominee or order for said sum of 2250*l.*, with interest at the rate aforesaid, (2.) transfer to your nominee of 1541 fully paid shares in the Sephinjuri Bheel Tea Company, Limited, and (3.) certificates of said 1541 shares in my name. 3. In case of default in payment of the principal sum on the date aforesaid or of any interest thereon on any due date, and if any such default shall continue for seven days after such date as aforesaid, you or your nominee shall be entitled at any time thereafter, without giving any notice or taking any preliminary step, either to take over the said shares in satisfaction of the said sum and interest absolutely, or to sell the said shares

at such price and in such manner in every respect as you shall see fit, and in the event of there being a deficiency after such sale of the shares, I agree to make good the same (without prejudice nevertheless to the obligations on my part herein contained). You or your nominee shall further be entitled in case of any such default as aforesaid to enforce payment of the said promissory note as and when you see fit. 4. I further agree as a shareholder in the Sephinjuri Bheel Tea Company, Limited, and in every other capacity to use my best endeavours to secure that you or any firm of brokers of which you for the time being shall be a partner (as you shall elect) shall always hereafter have the sale of all the company's teas as broker. And in the event of any of the company's teas being sold otherwise than through you or your firm, I personally engage and agree to pay to you or your firm the amount of the commission which you or your firm would have earned if the teas had been sold through you or your firm. This engagement on my part is in addition and without prejudice to any previous engagements to you and in particular to the contract dated August 14, 1889, by which I agreed on behalf of the proprietors to give you the sale of all the company's teas. I am, yours truly, Wm. McKenzie Bradley. May 16, 1892."

The second document was as follows: "Thomas Carritt, Esq. Dear Sir,—In consideration of your having at my request this day lent to my brother William McKenzie Bradley the sum of 2250*l.* at interest, I agree to use my best endeavours as a shareholder in the Sephinjuri Bheel Tea Company, Limited, and in every other capacity that you or any firm of brokers of which you for the time being shall be a partner (as you shall elect) shall always hereafter have the sale of all the company's teas as broker, and in case of any of the company's teas being sold otherwise than through you or your firm, I personally engage and agree to pay you the amount of the commission which you or your firm would have earned if the teas had been sold through you or your firm. This agreement is in addition and without prejudice to the letter dated August 14, 1889, signed by Mr. W. McKenzie Bradley as attorney for myself and my co-proprietors, in which I agree to give you the sale of

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the company's teas, which letter I adopt and confirm. I also agree to use my best endeavours to secure to you or any firm of brokers of which you shall be a partner for the time being (as you shall elect) the sale at all times hereafter of the entire tea crops of the Jestinga Valley Tea Company, Limited, or any continuation or amalgamation thereof. I am, yours truly, James Bradley. May 16, 1892."

In 1899 the plaintiff called in the loan; the defendant, W. M. Bradley, repaid it, and had the shares in the company transferred into his own name. Immediately afterwards he again transferred them by way of security for a fresh loan. The new transferee took advantage of his position to oust the plaintiff from his position as broker of the company, and thereupon the present action was brought. The defendants raised three defences: (1.) That on the true construction of the documents of May 16, 1892, the operation of the stipulations as to the plaintiff occupying the position of broker was confined to the existence of the security; (2.) that, if not, these documents ought to be rectified on the ground of mutual mistake; and (3.) that the stipulations just referred to were bad in law as between mortgagor and mortgagee. At the trial Bigham J. held that on the construction of the documents the stipulations were not limited to the period during which the security might remain in force. The question of mutual mistake was left to the jury, who gave a verdict for the plaintiff for 750*l*. Bigham J. held that the stipulations were not bad in law, and gave judgment for the plaintiff accordingly. From this judgment the defendants appeal, asking that judgment may be entered for them or a new trial ordered. Upon the argument the application for a new trial was practically abandoned, and the questions to be decided are those as to the construction of the documents and the validity of the stipulations.

Upon the former question we agree with Bigham J. According to the natural meaning of the documents the words "always hereafter" do not mean during the existence of the security, and we are unable to see that there is anything in the context or in the surrounding circumstances which renders it proper for the Court so to limit their operation.

The remaining question requires careful consideration. It was laid down in *Jennings* v. *Ward* (1) that "a man shall not have interest for his money, and a collateral advantage besides for the loan of it or clog the redemption with any by-agreement." These words have in some modern cases been treated as an accurate statement of the law: see, for example, *James* v. *Kerr*. (2) It has, however, been held by Romer J. and by the Court of Appeal in *Biggs* v. *Hoddinott* (3) that the proposition stated in *Jennings* v. *Ward* (1) is too wide, and that a collateral advantage may be bargained for, unless either (1.) the mortgagor's right to redeem on payment of principal, interest, and costs is fettered, or (2.) the bargain is unconscionable or oppressive. We consider that we are bound by what is so laid down. It is then to be considered, in the first place, whether the stipulations referred to do fetter the defendant's right to redeem. It was contended that any obligation on the part of the mortgagor which does not cease to have effect after redemption must be such a fetter. It was said that in the recent cases of *Biggs* v. *Hoddinott* (3) and *Santley* v. *Wilde* (4) the stipulations, which were held to be valid, ceased on redemption, while in the subsequent case of *Rice* v. *Noakes* (5) stipulations, which were held to be invalid, were intended to remain in operation after redemption. This may be so; but in none of those cases, nor in any other case, has it been laid down that it is essential for their validity that such stipulations shall cease to operate on redemption; nor, as it seems to us, could it be so held without departing from the principle on which (as we understand it) the decision in *Biggs* v. *Hoddinott* (3) was based. Lord Lindley, then Master of the Rolls, there remarked that it would be unfortunate for business men if the following proposition were laid down, namely, "That while two people are engaged in a mortgage transaction they cannot enter into any other transaction with each other which can possibly benefit the mortgagee, and that any such transaction must be before or after the mortgage, and be independent of it, so

(1) (1705) 2 Vern. 520.
(2) 40 Ch. D. 449.
(3) [1898] 2 Ch. 307.
(4) [1899] 2 Ch. 474.
(5) [1900] 1 Ch. 213; 2 Ch. 445.

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that it cannot be said that the mortgagee got any additional benefit from the mortgage transaction." He subsequently remarked: "Of course we must follow settled authorities, whether we like them or not; but do they support this proposition?" We take this to mean that, while existing rules are to be obeyed, they are not to be extended.

The cases in which redemption has been hitherto held to be fettered divide themselves into two classes—(1.) those in which the mortgagee has stipulated that on redemption he shall receive something beyond principal, interest, and costs, and (2.) those in which it is stipulated that the mortgaged property shall upon redemption come back to the mortgagor in a worse condition than it was when mortgaged. Of the former class *Broad* v. *Selfe* (1) may be taken as a modern example; and it is enough to remark that this class has been narrowed in recent times by such decisions as those in *Potter* v. *Edwards* (2) and *Mainland* v. *Upjohn*. (3) As regards the second class, the recent case of *Rice* v. *Noakes* (4) affords a striking illustration of the rule. There the subject-matter of the mortgage was a leasehold public-house, and the mortgagor covenanted so as to charge the premises into whosesoever possession the same might come, and to the further intent that the obligation of the covenant might run with the land, that the mortgagor would not use or sell or permit to be sold on the premises during the continuance of the term of the lease any malt liquors except those purchased from the mortgagee; and, further, that if and whenever there should be a breach of the foregoing covenant the mortgagor would pay 1000*l.* as liquidated damages for each such breach. It was held that these covenants in effect converted the public-house from a free into a tied house, and were within the doctrine of the Court. Rigby L.J. says (5): "The property which comes back to the mortgagor must not be worse than it was when it was mortgaged, and the mortgagee must not either expressly or by implication reserve to himself any hold upon the property after

(1) (1863) 11 W. R. 1036.
(2) (1857) 26 L. J. (Ch.) 468.
(3) 41 Ch. D. 126.
(4) [1900] 2 Ch. 445.
(5) [1900] 2 Ch. at p. 457.

the time for redemption has arrived and the right of redemption has been put in force." The present case certainly does not fall within the first class, whatever its extent may be; the mortgagor was entitled to redeem and did redeem without paying anything beyond principal, interest, and costs. Further, on redemption the property came back to the mortgagor just as it was when it was mortgaged; and the mortgagee did not expressly reserve to himself any hold upon the property after redemption. Neither did he do so in our opinion "by implication," an expression which we consider to have been used by Rigby L.J. with reference to a class of cases in which the obligation takes the form of a penal sum or liquidated damages by way of penalty on the doing of a particular thing. In such cases Courts of Equity, when satisfied that the object was to prevent the doing of the particular thing, have granted relief by way of injunction. See, for example, *National Provincial Bank of England* v. *Marshall*. (1) It is said, however, that the shares after redemption are fettered, inasmuch as the stipulations into which the mortgagor has entered will prevent him from dealing so freely with his property as he otherwise would; that he will, upon any proposed dealing with them, as, for example, by way of sale or mortgage, have to take into consideration that the result may be to deprive him of his controlling interest in the company and disable him from securing the position of broker to the plaintiff, and thus expose him to a serious liability. It is quite possible that an indirect effect of this nature may flow from these stipulations; but the same result would have followed if the stipulations had been entered into on the occasion of an advance being made by the plaintiff to the defendant W. M. Bradley on his personal security; and in that case the stipulation would, as it seems to us, have been perfectly valid; indeed, the contrary was hardly contended. There is no decision that such indirect effect of the stipulations brings them within the doctrine of equity under consideration; and so to hold would reduce the operation of the decision in *Biggs* v. *Hoddinott* (2) within very narrow limits. For these reasons we think that the equity of

(1) (1888) 40 Ch. D. 112. (2) [1898] 2 Ch. 307.

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redemption ought not in the present case to be held to be clogged.

It is, lastly, to be considered whether the transaction was oppressive or unconscionable. Now, the persons engaged in it were business men in the City of London, dealing at arms' length. There is no evidence of anything in the shape of undue influence or pressure. We cannot say that the stipulations were of themselves unreasonable; they seem to us eminently of a kind as to which business men in such a position may well be left to decide for themselves. In our judgment the transaction cannot be impeached on this ground. The result is that the appeal fails and ought to be dismissed.

Application dismissed.

Solicitors for plaintiff: *W. A. Crump & Sons.*
Solicitors for defendants: *Merriman, White & Thompson.*

E. L.

C. A. 1901 *June* 19, 20, 24.

[IN THE COURT OF APPEAL.]

HIRST *v.* WEST RIDING UNION BANKING COMPANY, LIMITED.

False Representation—Signature of Party to be Charged—9 Geo. 4, c. 14, s. 6—"Person"—Corporation—Signature by Agent of Company.

The word "person" in the 6th section of 9 Geo. 4, c. 14, includes a corporation; and an incorporated company is, under the terms of that section, not liable for a false representation of the kind contemplated by the section, made in a letter written and signed by their agent.

Swift v. *Jewsbury*, (1874) L. R. 9 Q. B. 301, followed.

APPLICATION by the defendants for judgment or a new trial in an action tried before Grantham J. with a jury.

The action was against the defendants, a banking company incorporated under the Companies Acts, to recover damages for a statement alleged to be a misrepresentation, made by the manager of one of their branches, within the scope of his employment and in their interests, with regard to the credit and position of a certain trading company, who were customers

of the defendants, acting on the faith of which misrepresentation the plaintiff had incurred loss. The representation complained of was contained in a letter signed by the defendants' before-mentioned manager, which was written by him in answer to a letter of inquiry addressed to the defendants by the plaintiff's bankers on behalf of the plaintiff. The jury found a verdict for the plaintiff, and judgment was entered accordingly.

Sir R. T. Reid, K.C. (*Montague Lush* and *Compston* with him), for the defendants. It was held in *Swift* v. *Jewsbury* (1) that, by the provisions of the 6th section of Lord Tenterden's Act (9 Geo. 4, c. 14), a false representation as to the credit of another person, in order to maintain an action, must be signed by the person to be charged himself, and not by an agent, and that a signature by a bank manager to such a representation could not be considered to be the signature of the banking company.

[They also cited *Clydesdale Bank* v. *Paton* (2); *Barwick* v. *English Joint Stock Bank.* (3)]

E. Tindal Atkinson, K.C., Longstaffe with him, for the plaintiff. The bank concerned in *Swift* v. *Jewsbury* (1) was not a corporation, but merely a co-partnership, empowered to sue and be sued in the name of their public officer, under 7 Geo. 4, c. 46. The defendants in this case are incorporated under the Companies Acts. It is submitted that "person" in the 6th section of Lord Tenterden's Act means a natural person, and does not include an artificial person, such as a corporation aggregate, which is incapable of personally signing a document. The section appears to assume that the "person" referred to can "sign." The Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 19, is not retrospective. It is well settled that a corporation may be liable for a false representation made by its agent: see *Barwick* v. *English Joint Stock Bank* (3); *Swift* v. *Jewsbury.* (1)

Sir R. T. Reid, K.C., in reply.

(1) L. R. 9 Q. B. 301. (2) [1896] A. C. 381.
(3) (1867) L. R. 2 Ex. 259.

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A. L. SMITH M.R. I am clearly of opinion that the defendants, the West Riding Union Banking Company, are in this case protected by Lord Tenterden's Act, and that it is not true to say that the provisions of s. 6 of the Act do not apply to an incorporated company. Therefore I think that the defendants succeed in their application, and judgment must be entered for them.

VAUGHAN WILLIAMS L.J. I also am of opinion that the bank is in this case protected by Lord Tenterden's Act.

STIRLING L.J. I am of the same opinion. I think that the bank, which is a corporation formed under the Companies Acts, is a "person" within the meaning of Lord Tenterden's Act. I will refer to what Lord Blackburn said in *Pharmaceutical Society* v. *London and Provincial Supply Association* (1) with regard to the meaning of the word "person" in a statute: "the word 'person' may very well include both a natural person, a human being, and an artificial person, a corporation. I think that in an Act of Parliament, unless there be something to the contrary, probably (but that I should not like to pledge myself to) it ought to be held to include both. I have equally no doubt that in common talk, the language of men not speaking technically, a 'person' does not include an artificial person, that is to say, a corporation. Nobody in common talk, if he were asked, Who is the richest person in London, would answer The London and North Western Railway Company. The thing is absurd. It is plain that in common conversation and ordinary speech, 'a person' would mean a natural person: in technical language it may mean the artificial person: in which way it is used in any particular Act must depend upon the context and the subject-matter. I do not think that the presumption that it does include an artificial person, a corporation, if that is the presumption, is at all a strong one. Circumstances, and indeed circumstances of a slight nature in the context, might shew in which way the word is to be construed in an Act of Parliament, whether it is to

(1) (1880) 5 App. Cas. 857.

have the one meaning or the other. I am quite clear about this, that, whenever you can see that the object of the Act requires that the word 'person' shall have the more extended or the less extended sense, then, whichever sense it requires, you should apply the word in that sense and construe the Act accordingly." Therefore the question, whether the word "person" in Lord Tenterden's Act includes a corporation, must be judged of by considering the context and the object of the enactment. Sect. 6 of that Act provides that "no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing signed by the party to be charged therewith." The meaning of that provision is stated very clearly by Bramwell B. in *Swift* v. *Jewsbury*. (1) He there says: "In my opinion the effect of the statute is this, that a man should not be liable for a fraudulent representation as to another person's means, unless he puts it down in writing, and acknowledges his responsibility for it by his own signature. He is neither to have the words proved by word of mouth, nor the authority given to an agent for whose act it is sought to make him responsible proved by word of mouth." It is now argued that the protection given by this enactment must be taken to be limited to "persons" who are capable of signing a representation, and therefore a corporation is not within it. That argument is based on the context: but I do not think that the true construction of the enactment supports it. It could not be argued that a human being, who by reason of some disease was incapacitated from signing a document, ought to be deprived of the protection of the Act, which he might need more than other persons. Nor do I think that there is anything in the object of the Act to exclude a corporation from the benefit of it. It has been held in *Williams* v. *Mason* (2) that, if one of two partners signs such a representation as is contemplated by the Act, his

(1) L. R. 9 Q. B. 301. (2) (1873) 28 L. T. 232.

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HIRST v. WEST RIDING UNION BANKING COMPANY.

Stirling L.J.

signature does not render the other partner liable, but only himself. In the case of *Swift* v. *Jewsbury* (1), to which I have referred, it was decided that a banking co-partnership under the statute 7 Geo. 4, c. 46, which was empowered to sue and be sued in the name of its public officer, was entitled to the protection of Lord Tenterden's Act. I cannot see why a corporation under the Companies Acts is not equally entitled to that protection. It appears to me that the object of the Act extends to affording the protection given by it to such a corporation. For these reasons I think the action is not maintainable against these defendants.

Application allowed.

Solicitors for plaintiff: *Rowcliffes & Co., for Ramsden, Sykes & Ramsden, Huddersfield.*

Solicitor for defendants: *A. M. Bradley, for Berry & Berry, Huddersfield.*

E. L.

C. A. 1901 *July* 3.

[IN THE COURT OF APPEAL.]

MIRAMS *v.* OUR DOGS PUBLISHING COMPANY, LIMITED.

Advertisement of Reward for return of Stolen Property — Penalty — "Any Property whatsoever" — Dog — Larceny Act, 1861 (24 & 25 *Vict. c.* 96), *s.* 102.

A dog is included in the words "any property whatsoever" in s. 102 of the Larceny Act, 1861, which imposes a penalty on any one who publicly advertises a reward for the return of any property whatsoever which shall have been stolen or lost, and uses in such advertisement any words purporting that no questions will be asked, and on any one who prints or publishes such an advertisement.

APPLICATION for judgment or a new trial in an action tried before Darling J. with a jury.

The action was by a common informer for a penalty alleged to have been incurred by the defendants under s. 102 of the Larceny Act, 1861. The defendants, who were proprietors of

(1) L. R. 9 Q. B. 301.

a newspaper called *Our Dogs*, published in their paper an advertisement by the owner of a dog which had been stolen or lost, offering a reward for the return of the dog, and stating that "no questions would be asked." The action was brought in respect of this advertisement. Under the direction of the learned judge the jury found a verdict for the plaintiff, and judgment was entered accordingly.

Rowlatt, for the defendants. Sect. 102 of the Larceny Act, 1861, provides that whosoever shall (among other things) publicly advertise a reward for the return of "any property whatsoever" which shall have been stolen or lost, and shall in such advertisement use any words purporting that no questions will be asked, or shall print or publish any such advertisement, shall forfeit the sum of 50*l.* for every such offence to any person who will sue for the same by action of debt to be recovered with full costs of suit. It is submitted that, upon the true construction of the section, taken in connection with the rest of the Act, the words "any property whatsoever" do not include a dog. There is at the commencement of the statute a small code of special provisions relating to dogs and other animals which were not at common law the subject of larceny. By s. 18 the offence of stealing a dog is, in the case of a first offence, made punishable on summary conviction by imprisonment for a period not exceeding six months, or by a penalty not exceeding 20*l.*, and only in the case of a subsequent offence is it made a misdemeanour punishable by imprisonment for a period not exceeding eighteen months. By s. 19 similar provisions are made with regard to the offence of receiving stolen dogs, knowing them to have been stolen; and s. 22 provides expressly for the restoration of a dog which has been stolen to the owner by order of a justice. Sect. 102 forms one of a group of sections headed "As to restitution and recovery of stolen property," and in which the words "any property whatsoever" occur. It is submitted that the words "any property whatsoever" in ss. 100 and 101 cannot include a dog, for the case of which other provisions have previously been made by the sections to which reference has been made in the

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earlier part of the Act, and which provide specially for the case of dog-stealing and the restitution of a stolen dog to the owner. It is natural to suppose that the words "any property whatsoever" have the same meaning in all those sections.

Holloway, for the plaintiff, was not called upon.

A. L. SMITH M.R. It is argued in this case that we ought to limit the natural meaning of the plain and unambiguous words of s. 102 of the Larceny Act, 1861, and to hold that the section does not apply to dogs. If ever there was an article of property with regard to which such a provision as is contained in the section is necessary, it is so with regard to dogs; but the defendants' counsel endeavoured with great ingenuity to persuade us to say that the words "any property whatsoever" in that section do not include a dog. He argued that, because some of the immediately preceding sections, in which these words occur, cannot be applied in the case of dogs, s. 102 is not applicable in their case. I am not prepared to assent to his contentions with regard to the construction of those sections, but, assuming that he is right in those contentions, I do not think that they afford any reason for cutting down the plain words of s. 102. I may also observe that the definition of the word "property" given by s. 1 of the Larceny Act, 1861, is of the widest possible character. For these reasons I think the application must be dismissed.

VAUGHAN WILLIAMS L.J. and STIRLING L.J. concurred.

Application dismissed.

Solicitor for plaintiff: *Richard Hewlett, for A. Mirams, Brighton.*

Solicitors for defendants: *Woodcock, Ryland & Parker, for Markland & Whitehead, Manchester.*

E. L.

ROYAL EXCHANGE ASSURANCE CORPORATION *v.* SJORFORSAKRINGS AKTIEBOLAGET VEGA.

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June 9, 15.

Insurance (Marine)—Policy—Time Policy for more than Twelve Months—Continuation Clause, Validity of—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 93.

A policy of marine insurance upon a ship for the period of twelve months contained the following clause: "Should the vessel be at sea or abroad on the expiration of this policy, it is agreed to hold her covered until arrival at her port of final destination in the United Kingdom or on the Continent of Europe at a pro ratâ daily premium." On the expiration of the twelve months the ship was abroad, and on her voyage home was lost. In an action on the policy:—

Held, that the policy was one entire contract of insurance for a time exceeding twelve months, and was consequently invalid as being in contravention of s. 93, sub-s. 3, of the Stamp Act, 1891.

FURTHER CONSIDERATION before Bigham J.

On October 18, 1898, Messrs. Pickford, brokers at Lloyd's, effected, on behalf of the owners of the *Merrimac*, with Messrs. Gray, Dawes & Co.'s underwriters a policy for 4200*l.* on hull and machinery against all risks for twelve months from October 18, 1898, to October 18, 1899. The policy contained the following clause: "Should the vessel be at sea or abroad on the expiration of this policy, it is agreed to hold her covered until arrival at her port of final destination in the United Kingdom or on the Continent of Europe at a pro ratâ daily premium to the within." Gray, Dawes & Co.'s underwriters reinsured 1050*l.* of the 4200*l.* with the plaintiffs for the same period against total loss only. This insurance was expressed to be a "reinsurance of Gray, Dawes & Co.'s underwriters subject to terms, pro ratâ returns, continuation, valuation, clauses and conditions of the original policy or policies, and to pay as may be paid thereon." By the policy now sued upon, dated October 22, 1898, the plaintiffs reinsured 750*l.* of their 1050*l.* with the defendants, a Swedish company, who executed it in Sweden.

This policy contained the following clauses: "Continuation

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clause as per original policy," and "Subject to all the same clauses, terms, conditions, continuations, &c., that do or shall attach to the original policy $\frac{\text{and}}{\text{or}}$ policies, and to pay $\frac{\text{and}}{\text{or}}$ receive as may be paid $\frac{\text{and}}{\text{or}}$ received thereon anything herein to the contrary notwithstanding. All claims $\frac{\text{and}}{\text{or}}$ losses payable in London. In the event of claim the Vega Company agree and undertake to pay upon the claim-note of the Royal Exchange Assurance Corporation, stating such claim to have already been settled by same. In case of any dispute under this policy, the Vega Company agree to be bound in all things by the jurisdiction and decision of the English Law Courts." During the currency of the policies the *Merrimac* sustained heavy damage and put into Quebec, where temporary repairs were effected with the view of bringing her home for permanent repairs. On October 25, 1899, after the expiry of the twelve months, the *Merrimac* sailed from Quebec for the United Kingdom and was totally lost on that voyage.

At the trial before Bigham J. the policy of reinsurance sued upon was tendered in evidence. The judge took the objection, following his own decision in *Charlesworth* v. *Faber* (1), that the policy was a time policy for more than twelve months and, therefore, invalid under s. 93, sub-s. 3, of the Stamp Act, 1891 (2), but reserved the question for further consideration.

Joseph Walton, K.C., and *Chaytor*, for the plaintiffs. The point decided in *Charlesworth* v. *Faber* (1) was not argued by counsel. Assuming, however, that case to have been rightly decided, the present case differs in that there the policy was issued in London; here it was issued in Sweden, and is governed by the law of the country where it was made. According to Swedish law, the continuation clause is free from objection.

(1) (1900) 5 Com. Cas. 408.

(2) By s. 93, sub-s. 3, of the Stamp Act, 1891, "A policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding twelve months."

By s. 94, "Where any sea insurance is made for a voyage and also for time, or to extend to or cover any time beyond thirty days after the ship shall have arrived at her destination and been there moored at anchor, the policy is to be charged with duty as a policy for a voyage, and also with duty as a policy for time."

The general rule with regard to the sufficiency of a contract is that its legality is to be determined by the law of the country where it was made; except where the objection relates to a matter of procedure only, such as the admissibility of evidence of its existence, in which case the sufficiency is to be determined by the law of the country where it is sought to be enforced. Thus, in *Leroux* v. *Brown* (1), it was held that no action would lie in this country to enforce a parol agreement made in France, and valid there, which if made here could not by reason of s. 4 of the Statute of Frauds have been sued upon, because the absence of a writing in cases coming under s. 4 goes only to the question of procedure. But it was there conceded that if the statute had rendered the contract absolutely void in case it had been made here, then the law of France would have applied, and the contract would have been enforced here. Conversely, in *Bristow* v. *Sequeville* (2), it was held that a document which by the law of a foreign country is not admissible in evidence there for want of a stamp, is nevertheless admissible here; but where by the foreign law the want of the stamp renders the contract void it cannot be enforced here. The same principle was laid down in *Guepratte* v. *Young*. (3) But s. 93 of the Stamp Act, 1891, does not deal with a mere matter of procedure, but with the essential legality of the contract. It renders a policy expressed to be for a period exceeding twelve months void ab initio; so that if the contract had been made here it could not have been sued upon even in Sweden. Secondly, this was not a contract for a period exceeding twelve months, but a contract for twelve months followed by a contract for a voyage. The termini of that voyage are the place where she might happen to be on October 18, 1899 and her port of destination in the United Kingdom or on the Continent. The case falls within s. 94, which provides for the case of a policy being for a voyage and also for time, in which case it is chargeable with two stamps. Or, again, the policy here may be regarded as two contracts for time, which also no doubt would require two stamps; but the

(1) (1852) 12 C. B. 801. (2) (1850) 5 Ex. 275.
(3) (1851) 4 De G. & Sm. 217.

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fact of their being expressed on one document does not make them void.

Theobald Mathew, (*Scrutton*, *K.C.*, with him), for the defendants. This is clearly a policy for more than twelve months. Assuming, then, that the effect of s. 93 of the Stamp Act is to make a policy for more than twelve months void, as distinguished from being merely unenforceable, still this policy cannot be sued upon, because it is to be governed by English and not by Swedish law. The correct rule on the subject is that laid down in *In re Missouri Steamship Co.* (1), that although, where a contract is made in one country to be performed wholly or partially in another, primâ facie the contract is to be construed and enforced according to the lex loci contractûs, yet the Court will look at all the circumstances to ascertain by the law of which country the parties intended the contract to be governed, and will enforce the contract accordingly. Here it is clear the parties intended the policy to be governed by English law, for not only were claims to be payable in London, but the defendants expressly agreed "to be bound in all things by the jurisdiction and decision of the English law courts."

Walton, *K.C.*, in reply.

Cur. adv. vult.

June 15. BIGHAM J. The only question to be dealt with is as to the admissibility in evidence of the policy sued upon. The facts, so far as they are material, are as follows: On October 18, 1898, Messrs. Gray, Dawes & Co.'s underwriters effected a policy of insurance for 4200*l.* on a vessel called the *Merrimac* for the space of twelve calendar months from October 18, 1898, to October 18, 1899. The policy was on the ordinary Lloyd's form, and contained the words "including printed clauses as attached." There was attached to the policy a slip containing a number of stipulations headed "Time clauses." One of those stipulations was as follows: "Should the vessel be at sea or abroad on the expiration of this policy, it is agreed to hold her covered until arrival at her port of

(1) (1889) 42 Ch. D. 321.

final destination in the United Kingdom or on the Continent of Europe at a pro ratâ daily premium to the within." That policy was an English contract governed entirely by English law. Subsequently Messrs. Gray, Dawes & Co. reinsured a part of their risk, namely, 1050*l.*, with the present plaintiffs, the Royal Exchange Assurance Corporation. That policy of reinsurance was expressed to be "a reinsurance of Gray, Dawes & Co.'s underwriters subject to terms, pro ratâ returns, continuation, valuation, clauses and conditions of the original policy or policies, and to pay as may be paid thereon." That policy is also on the ordinary Lloyd's form, and, like the first policy, is an English policy governed exclusively by English law. Subsequently the plaintiffs effected a third policy, reinsuring a part of their risk—750*l.*—with the defendants. The defendants are a foreign company having their head office in Sweden. Their business is to insure marine risks, and for the purpose of that business they have an agent in London named Guttman, who solicits offers on their behalf. In this case Guttman submitted the offer of reinsurance of the plaintiffs to the defendants, who accepted it and issued the policy now sued upon. The policy is also on the ordinary Lloyd's form, and is for all practical purposes word for word the same as the two previous policies; it is for the same period, namely, twelve months from October 18, 1898, and contains the words "continuation clause as per original policy," the continuation clause being the clause to which I have already referred. It also contains a memorandum not to be found in the other two policies, which is as follows: "Being a reinsurance to the Royal Exchange Assurance Corporation subject to all the same clauses terms, conditions, continuation, &c., that do or shall attach to the original policy $\frac{\text{and}}{\text{or}}$ policies, and to pay $\frac{\text{and}}{\text{or}}$ receive as may be paid $\frac{\text{and}}{\text{or}}$ received thereon, anything herein to the contrary notwithstanding. All the claims $\frac{\text{and}}{\text{or}}$ losses payable in London. In the event of claim the Vega Company agree and undertake to pay upon the claim-note of the Royal Exchange Assurance Corporation stating such claim to have already been settled by same. In case of any dispute under this policy, the Vega Company agree to be bound in all things

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by the jurisdiction and decision of the English law courts." The document is executed according to the law of Sweden by the defendant company.

When the twelve months expired on October 18, 1899, the *Merrimac* was at Quebec. She was seriously damaged, and her owners proposed to bring her home under temporary repairs. The defendants declined to be bound by the risk which would be thereby involved, and they accordingly defend this action thinking, rightly or wrongly, that their policy even with the continuation clause did not oblige them to undertake a risk of that kind. The ship sailed for home, and in the course of her voyage was totally lost. The action came on for trial before me, and the plaintiffs tendered in evidence the policy issued by the defendants. It is not stamped, and the question I have to decide is whether I ought to admit the document in evidence, and, if I ought, on what terms as to penalty or otherwise. The Stamp Act, 1891, contains a number of provisions specially relating to policies of sea insurance. Sect. 92 of that Act defines such a policy: "For the purposes of this Act the expression 'policy of sea insurance' means any insurance (including reinsurance) made upon any ship or vessel, &c." So that it includes a policy of the kind sued upon in this action. By s. 93, sub-s. 1, "A contract for sea insurance (other than such insurance as is referred to in the fifty-fifth section of the Merchant Shipping Act Amendment Act, 1862) shall not be valid unless the same is expressed in a policy of sea insurance." Sub-s. 2: "No policy of sea insurance made for time shall be made for any time exceeding twelve months." Sub-s. 3: "A policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and" —and here we must read in the words "if it be a time policy" —"is made for a period not exceeding twelve months." The question, then, which I have to decide is whether this is a policy for more than twelve months, for if it is, it is invalid. I am of opinion that it is a policy made for a time exceeding twelve months. It was suggested by the plaintiffs that I might regard the document as containing two separate contracts of

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insurance, one for time—namely, for twelve months—and one for the voyage made under the continuation clause, and that upon payment of the penalty provided by s. 95, sub-s. 2, the document would be admissible in evidence to prove the insurance for the voyage as distinguished from the insurance for time. I, however, do not think that this contention is sound. If it were, I should be obliged to hold that there were to be found in one and the same document one contract of insurance to which no implied warranty of seaworthiness attached, namely, the time policy, and another to which such a warranty did attach, namely, the voyage policy. Moreover, the voyage is not in any way specified—the termini are not named. There is, therefore, no such description of the particular risk insured as is required by s. 93, sub-s. 3. And it is clear that under that sub-section a voyage policy which does not state where the voyage commences and where it ends is not a valid policy at all. Nor do I think that this document can be regarded as constituting two separate policies of insurance for time, one for twelve months and one for an indefinite period, commencing upon the expiry of the twelve months, for a time policy also must, if it is to be valid under s. 93, sub-s. 3, specify the particular risk—that is to say, it must specify the date when the risk is to commence and the date when the risk is to end. Therefore, I come to the conclusion that this is a policy made for a period exceeding twelve months, and is consequently invalid within the meaning of the statute. I do not mean, nor is it necessary to decide, that this policy may not be perfectly good as a time policy for twelve months, and that if the loss had occurred within the twelve months the policy could not have been given in evidence against the defendants. I think it would have been competent for the Court to reject the continuation clause as forming a part of the contract which was not good in law, but which was severable. I may refer to what was said by Willes J. in *Pickering* v. *Ilfracombe Ry. Co.* (1): "The general rule is that where you cannot sever the illegal from the legal part of a covenant the contract is altogether void; but where you can sever them, whether the illegality be

(1) (1868) L. R. 3 C. P. 235, at p. 250.

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created by statute or by the common law, you may reject the bad part and retain the good."

But it was contended that even if this policy was invalid according to English law, yet it was admissible in evidence in our Courts because it was to be construed by Swedish law. Now, no doubt, as a rule, the law to be applied in construing and enforcing a contract is the law of the country where the contract is made; but this is only because, in the absence of other circumstances, our Courts assume that such was the intention of the parties. If it should appear clearly from other circumstances that the parties intended that the rights should be ascertained and determined by some other law, our Courts will give effect to such intention. The law upon the subject is fully dealt with in the comparatively recent case of *In re Missouri Steamship Co.* (1), and that case is, in my opinion, an authority for the proposition that I have laid down. In this case the circumstances, in my opinion, clearly shew an intention that the contract should be governed by English law and not by Swedish law. It is a reinsurance of a reinsurance of an original insurance effected at Lloyd's. The original insurance is on the Lloyd's form, and is a contract made in England and to which English law alone is applicable. So is the first reinsurance. The policy sued upon was no doubt executed by the defendants in Sweden, but it was in every business sense made in London. Its terms were arranged by the resident agent of the defendants; like the other policies, it was drawn up on the common Lloyd's form; and it contains the additional clause to which I have referred, that all claims and losses shall be payable in London—that is to say, that the place of performance is to be in London; that payment shall be made upon a claim-note of the plaintiff corporation stating that the claim has been settled by them in accordance with English law; and that in case of any dispute the defendants shall be bound by the jurisdiction and decision of the English law courts. In view of these facts, I can have no doubt but that both parties intended that the contract should be construed and dealt with as an English contract. And if at the time the negotiations

(1) 42 Ch. D. 321.

for the contract were going on it had been suggested to the plaintiffs that they were reinsuring with reference to the Swedish law a risk which they had undertaken with reference to English law they would at once have repudiated the suggestion, and so too would the defendants. But even assuming that the policy is to be interpreted with reference to Swedish law, I should still be of opinion that it could not be admitted in evidence. The statute makes such a contract invalid. That means no more than that it is a contract which cannot be put in suit. It is not illegal or immoral. The case, therefore, falls within the authority of *Leroux* v. *Brown*. (1) The document is shut out because it would be contrary to our procedure to admit it. For these reasons I think this is a policy which cannot be admitted in evidence, and I must accordingly hold that the plaintiffs are unable to make out their case.

It is only right that I should say that the point was not taken by the defendants. It was taken by me, as I thought I was bound to take it. The defendants desire that the case should be tried upon its merits; but it cannot be tried upon its merits for the reason that it cannot be launched.

Judgment for the defendants.

Solicitors for plaintiffs: *Hollams, Son, Coward & Hawksley.*

Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

(1) 12 C. B. 801.

J. F. C.

C. A.
1901
June 21.

[IN THE COURT OF APPEAL.]

ALMAN *v.* OPPERT.

Practice — Particulars — Directors' Liability — Statements in Prospectus — "Reasonable Ground to believe" Truth of Statements—Directors' Liability Act, 1890 (53 *& 54 Vict. c.* 64), *s.* 3—*Rules of Supreme Court, Order* XIX., *r.* 6.

In an action against directors of a company claiming compensation under the Directors' Liability Act, 1890, in respect of untrue statements contained in the prospectus of the company, the defendants by their defence said that they bonâ fide believed the statements to be true, and that they had reasonable grounds for their belief:—

Held, that the defendants must deliver particulars of the grounds of their belief.

Decision of Day J. reversed.

APPEAL against the refusal by Day J. of an application by the plaintiffs for particulars.

The action was brought by holders of mortgage debentures issued by a company against directors of the company, claiming compensation under the Directors' Liability Act, 1890 (1), in respect of alleged untrue statements contained in the prospectus of the company on the faith of which the plaintiffs had applied for their debentures. By their defence the directors said that at the time when the prospectus was issued they and each of them "bonâ fide believed, and still bonâ fide believe, the statements in the prospectus to be true, and the defendants had reasonable grounds for such belief." The plaintiffs applied for an order that the defendants should deliver particulars of the grounds of their belief.

Day J. refused the application.

The plaintiffs appealed.

(1) By s. 3 of the Act, "(1.) Where, after the passing of this Act, a prospectus or notice invites persons to subscribe for shares in or debentures or debenture stock of a company, every person who is a director of the company at the time of the issue of the prospectus or notice, and every person who having authorized such naming of him is named in the prospectus or notice as a director of the company or as having agreed to become a director of the company, either immediately or after an interval

Montague Lush, for the plaintiffs. The plaintiffs are entitled to know whether the defendants have a good primâ facie defence. The practice has differed as to requiring particulars to be given in such a case, and there is no reported decision on the point. If particulars are not given, the plaintiffs would go to trial quite in the dark as to the case which they would have to meet, just as if the defendants had said only, "We rely on the Directors' Liability Act." Under the present practice in a libel action, e.g., it is not enough for a defendant to say simply that the occasion was privileged: he must state the facts on which he relies. The defence of "reasonable grounds of belief" is created by the statute, and the defence in the present case amounts to saying "not guilty by statute," a defence which is not now permissible.

Bremner, for the defendants. It is very difficult for a man to state exactly his reasons for his belief of anything. The defendants would be tied down to the reasons which they stated in the particulars. They would have to disclose every word that their witnesses were going to say at the trial. In *Derry* v. *Peek* (1) Lord Halsbury said: "I do not believe that any one can so far analyze his mental impressions as to be able to say what particular fact in a prospectus induced him to subscribe." So in this case it would be very difficult, if not impossible, for the defendants to state the exact grounds of their belief. To analyze the state of their minds might be a difficult metaphysical problem.

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of time, and every promoter of the company, and every person who has authorized the issue of the prospectus or notice, shall be liable to pay compensation to all persons who shall subscribe for any shares, debentures, or debenture stock on the faith of such prospectus or notice for the loss or damage they may have sustained by reason of any untrue statement in the prospectus or notice, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless it is proved (inter alia)—(*a*) With respect to every such untrue statement not purporting to be made on the authority of an expert, or of a public official document or statement, that he had reasonable ground to believe, and did up to the time of the allotment of the shares, debentures, or debenture stock, as the case may be, believe, that the statement was true."

(1) (1889) 14 App. Cas. 337, at p. 344.

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COLLINS L.J. In my opinion, having regard to the provisions of the Act, particulars ought to be given by the defendants. The question is whether they had reasonable grounds for believing the statements in the prospectus to be true. That being so, it would be very strange that the person whose business it will be to dispute the reasonableness of the grounds of belief should not be entitled to know beforehand what those grounds were. A man who sets up as his defence that he believed a statement and had reasonable grounds for so doing can hardly say that it would be an intolerable burden to state the grounds of his belief, and I do not think it would be unfair to impose that burden on him. I can quite understand that there may be difficulties in the way of stating the grounds of belief; but I do not think the task is insuperable. There are other cases in which particulars addressed to the state of a person's mind are ordered as a matter of course, e.g., in an action for malicious prosecution, particulars going to the question whether the defendant had reasonable and probable cause for what he did. Such cases can be dealt with in practice without a study of metaphysics. There is, of course, underlying the giving of particulars the cardinal principle that no one can be compelled to do that which is impossible, and, if a defendant is unable to analyze the grounds of his belief, he must say so. In my opinion the appeal should be allowed, and the respondents must pay the costs.

STIRLING L.J. I agree. The object of particulars is simply to enable the opposite party to know the case which he will have to meet at the trial. In the present case the question is whether the defendants had reasonable grounds for believing certain statements to be true. It appears to me perfectly possible for the defendants, without disclosing their evidence, to state in general terms the grounds of their belief. I think that under Order XIX., r. 6, particulars are necessary beyond what is stated in the defence.

Appeal allowed.

Solicitors: *Haslam & Son; Ashurst, Morris & Co.*

W. L. C.

POLL *v.* DAMBE.

1901
May 14;
June 13.

Ship—Merchant Shipping Acts—Offences—Foreign Ship, Persuading Seaman to Desert from—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 236, *sub-s.* 1.

By s. 236, sub-s. 1, of the Merchant Shipping Act, 1894, "If a person by any means whatever persuades or attempts to persuade a seaman or apprentice . . . . to desert from his ship" he shall be guilty of an offence:—

Held, that this section applies only to British ships, and does not make it an offence to persuade a seaman to desert from a foreign ship lying in a port in this country.

CASE stated by the stipendiary magistrate for Cardiff.

An information was preferred by the respondent under the Merchant Shipping Act, 1894, against the appellant, charging that he, on December 25, 1900, at Cardiff, did unlawfully pursuade a seaman named Johannes Pilder to desert from his ship called the *Lennox*.

Upon the hearing of the information the following facts were proved:—

The respondent was the master of the Russian ship *Lennox*, which, at the time alleged in the information, was lying at the West Dock at Cardiff. The said ship was not registered or owned in the United Kingdom, and was not a British ship, but a foreign ship.

On December 25 Johannes Pilder, who was then a foreign seaman lawfully engaged on the *Lennox*, met the appellant Poll, a boarding-master, living at Cardiff. At this interview the appellant persuaded Pilder to desert from the *Lennox* and to join another ship where he would receive better wages.

Pilder did then desert from the *Lennox*, and on the following day was taken to the railway station at Cardiff by the appellant, who, after providing him with a ticket, saw him leave the station in a train for Bristol in the company of five other sailors and an agent of the appellant. Pilder was subsequently,

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on January 1, arrested on a warrant as a deserter from the *Lennox*.

On the part of the appellant it was contended that the magistrate had no jurisdiction to hear and determine the case, the offence being charged in respect of a foreign seaman engaged on a foreign ship, and by ss. 260, 261 of the Merchant Shipping Act, 1894, Part II. of the Act (to which the section creating the offence belongs) is restricted in its application to the ships mentioned therein, namely, seagoing ships registered in the United Kingdom, and seagoing British ships registered out of the United Kingdom; that the words "his ship" contained in s. 236 are not general so as to make the section applicable to a foreign ship, and that for this reason the case was not governed by *Reg.* v. *Stewart* (1), which was decided on s. 111, a section prohibiting crimping; and that in order to make s. 236 applicable to the ship *Lennox*, the Russian Government should have availed itself of the provisions of s. 734 of the Act.

On the part of the respondent it was contended that s. 236 applies to foreign ships; that the words "his ship" in that section are as general as the words "any ship in the United Kingdom" in s. 111; and that as both sections fall under Part II. of the Act, the case was governed by *Reg.* v. *Stewart*. (1)

The magistrate was of opinion that the contention of the respondent was correct, and convicted the appellant subject to a case for the opinion of the Court.

Bailhache, for the appellant. The application of s. 236 of the Merchant Shipping Act, 1894, is confined to British ships. If that section is to be regarded as of general application, then sub-s. 3 of s. 238, which deals with the offence of harbouring deserters from foreign ships, would be superfluous, for the case would be already covered by sub-s. 2 of s. 236. If, therefore, there were no authority on the matter, the conclusion would be that s. 236 does not apply to a foreign ship. Except in the matter of limiting shipowners' liability for damage there seems

(1) [1899] 1 Q. B. 964.

to be no tendency in this legislation to protect foreign ships. Sects. 260–262, which deal with the application of Part II. of the Act (within which Part s. 236 comes) apply the Part only to ships registered in the United Kingdom, British ships registered abroad, lighthouse ships, pleasure yachts, and fishing boats; they are silent as to foreign ships. Where other parts of the Act are intended to apply to foreign ships it is expressly so stated: thus, for the purposes of Part III., which relates (inter alia) to emigrant ships, the term "emigrant ship" is defined by s. 268 to mean seagoing ships of a certain class "whether British or foreign." Sect. 734 empowers the Crown by Order in Council to apply any provisions of the Act to foreign ships; but no order has been made applying s. 236 to Russian ships. Then as to authority. The case of *Leary* v. *Lloyd* (1) is a decision directly in the appellant's favour. The Court there held that the disciplinary provisions of the Act of 1854, which are in the same terms as those of 1894, applied only to British ships. In *The Milford* (2) Dr. Lushington held, with reference to the sections of the Act of 1854 corresponding to ss. 260, 261, that as they contained no negative words they did not restrain the general application of the part of the Act in which they occurred. That ruling, it is contended, was wrong, though the actual decision, namely, that the provisions empowering a master to sue in rem for his wages extend to masters of foreign ships, may well be supported on the supposition that the Legislature intended to bring the English law on that subject into harmony with the law of other countries, under which the master has always been so allowed to sue. The decision is not necessarily in conflict with *Leary* v. *Lloyd* (1), the decision in which as to the non-application of Part III. of the Act of 1854 to foreign ships was confined to the disciplinary provisions of that Part. In *Reg.* v. *Stewart* (3) it was held by Darling and Channell JJ. that s. 111 of Part II. of the Act of 1894, which prohibited unauthorized persons from engaging seamen, applied where the ship for which the seamen were engaged was a foreign ship. That case followed a decision of the Court of

(1) (1860) 3 E. & E. 178. (2) (1858) Swabey, 362.
(3) [1899] 1 Q. B. 964.

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Session in *Hart* v. *Alexander* (1), in which a distinction was drawn between sections relating to the protection of persons and those relating to the protection of ships. Sect. 111 belongs to the former class; s. 236 to the latter. Channell J. in *Reg.* v. *Stewart* (2) indeed went the length of holding that Part II. as a whole is of general application; but it is contended that that view is wrong. For instance, s. 221, which deals with the subject of desertion, obviously is limited to British ships, for it refers to the case of the desertion taking place abroad, which could have no application to a foreign ship.

H. Sutton, for the respondent. The language of s. 236 should be construed by itself without reference to earlier Acts or to the decisions upon them. This is a consolidation Act. In *Bank of England* v. *Vagliano Brothers* (3) Lord Herschell pointed out the manner in which an Act of that description ought to be dealt with: "I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view." And in *The Fulham* (4) A. L. Smith L.J., in dealing with the Act now before the Court, the Merchant Shipping Act, 1894, took the same view. Then apart from authority the case falls within s. 236, for the words "his ship" are perfectly general. The offence is a personal matter; the section is dealing with the act of an individual in persuading a seaman to desert; and from the point of view of the offence it is immaterial whether the ship from which the seaman is persuaded to desert is a British or a foreign ship. Moreover, though the opinion of Blackburn J. in *Leary* v. *Lloyd* (5) is entitled to great respect, the weight of the authority of that decision is much diminished by the fact that the application of the part of the Act there in question to

(1) (1898) 36 S. L. R. 64.
(2) [1899] 1 Q. B. 964.
(3) [1891] A. C. 107, at p. 144.
(4) [1899] P. 251, at p. 259.
(5) 3 E. & E. 178.

foreign ships was not argued by counsel, nor was the case of *The Milford* (1) cited to the Court.

Bailhache, in reply.

Cur. adv. vult.

June 13. The judgment of the Court (Lord Alverstone C.J., Lawrance and Phillimore JJ.) was delivered by

PHILLIMORE J. This case is stated by the stipendiary magistrate for Cardiff, and upon it we have to determine whether it is an offence under the Merchant Shipping Act, 1894, to persuade in England a foreign seaman to desert from a foreign ship while such ship is lying in an English port.

The language of s. 236, sub-s. 1, is as follows: "If a person by any means whatever persuades or attempts to persuade a seaman or apprentice to neglect or refuse to join or proceed to sea in or to desert from his ship, or otherwise to absent himself from his duty, he shall for each offence in respect of each seaman or apprentice be liable to a fine not exceeding ten pounds."

By s. 742, "'Seaman' includes every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship."

The language of the Act is thus wide enough to cover this case; but it is contended on behalf of the appellant that Part II. of the Merchant Shipping Act, in which this section is found, applies only (except in certain specified places) to British ships, and that the word "ship" in s. 236 must be read as meaning British ship. Sect. 236, making it criminal to persuade desertion, may be looked upon as supplementary to the earlier sections, which makes desertion itself punishable. They are ss. 221–224, both inclusive, and s. 238. Sects. 221–224 are in equally general terms, and they follow upon s. 220, which contains express words limiting its own application to the crews of British ships. There is, therefore, some ground for supposing that ss. 221–224 were not intended to be so limited.

(1) Swabey, 362.

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The sections as to the application of Part II. are ss. 260–266, both inclusive. By s. 260 this part "shall, unless the context or subject-matter requires a different application, apply to all seagoing ships registered in the United Kingdom, and to the owners, masters, and crews of such ships," with certain qualifications as to lighthouse vessels, yachts, and fishing-boats, which are dealt with in ss. 262 and 263. By s. 261 this part shall, unless as aforesaid, apply to all seagoing British ships registered out of the United Kingdom, and their owners, masters, and crews, in respect of certain specified matters, one of which is discipline.

It will be important to note that this specification of details occurs only in the section which deals with British ships registered out of the United Kingdom, and that there is the same arrangement in s. 109 of the Act of 1854, which in substance corresponds with ss. 260 and 261 of the Act of 1894. This is not unimportant in view of some observations of Blackburn J. in the case of *Leary* v. *Lloyd*. (1) Sect. 264 enables colonial legislatures to adopt any provisions of this part which do not otherwise apply, and s. 265 provides for the case of an apparent conflict of laws "in any matters relating to a ship or to a person belonging to a ship." This section would not meet the case of a conflict between the laws of differents parts of His Majesty's dominions; but it might have a wider application in the case of any sections of Part II. of the Act which apply to foreign ships. Sect. 266 is not material to this case. It is clear, therefore, that as a general rule this part of the Act is not to apply to foreign ships, that is to say, it is not to be enforced against foreign ships or owners of foreign ships, or persons on board foreign ships, or as to matters done or to be done on board foreign ships. But it does not, therefore, necessarily follow that it does not apply to persons who have deserted from foreign ships, or to English subjects who in England have abetted such desertion.

A formidable argument, however, against the application of the sections as to desertion to deserters from foreign ships is derived from s. 238. By this section, where it appears to the

(1) 3 E. & E. 178.

Crown "that due facilities are or will be given by the government of any foreign country for recovering and apprehending seamen who desert from British merchant ships in that country," the Crown may by Order in Council direct that this section shall apply, and when it applies and a seaman deserts when within any of the King's dominions from a merchant ship belonging to a subject of that country "any Court, justice, or officer that would have had cognizance of the matter if the seaman had deserted from a British ship shall, on the application of a consular officer of a foreign country, aid in apprehending the deserter," and may "order him to be conveyed on board his ship or delivered to the master, &c."

It is said that it is only under this section that deserters from foreign ships can be dealt with by an English Court, and also that this section would be unnecessary if the general provisions of ss. 221–224 applied to foreign as well as British ships.

The 3rd sub-section of s. 238 inflicts a penalty not exceeding 10*l.* for harbouring or secreting a deserter who is liable to be apprehended under this section. This is said to overlap sub-s. 2 of s. 236. There is no sub-section in s. 238 corresponding with sub-s. 1 of s. 236, under which the information in the present case was laid. The weight of this argument is to a certain extent lessened by the consideration that the Act of 1894 is a consolidating Act, and includes not only the Act of 1854, but several other Acts. Sect. 238 is a re-enactment of the Foreign Deserters Act, 1852 (15 & 16 Vict. c. 26), an earlier Act than the Act of 1854. It may well be that the Act of 1854 did make that of general application which had only limited application by the Act of 1852; and in some respects the special provisions of the Act of 1852, as reproduced in s. 238, are different from the general provisions in the Act of 1894.

Still, in our opinion, having regard to the terms of s. 221, the general sections as to deserters—221–224—do not apply to cases which come or may come by the operation of an Order in Council under s. 238. The procedure is different; the seaman to whom s. 222 applies is to be conveyed on board his ship, not by warrant of the Court, but by the master or certain other

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persons with or without the assistance of a police-constable, and may require to be taken before a Court to be dealt with according to law. More complicated provisions are applied to cases under s. 223. But under s. 238 there is to be a warrant under which the man is to be conveyed on board his ship, and when the warrant has been issued, the seaman apparently has no direct right to have recourse to the Court which issued it. The penalty for harbouring is different. And in s. 238 there is a significant proviso, to which we have not yet referred, excepting the case of a seaman who is a slave. There is no such proviso in ss. 221–224. We therefore come to the conclusion that ss. 221–224 apply only to British ships, and that the offence of desertion from a foreign ship is punishable only under s. 238 and when that section has been applied by Order in Council. Similarly we must hold that the offence of harbouring a deserter from a foreign ship comes, if at all, under sub-s. 2 of s. 238, and does not come under sub-s. 2 of s. 236. Holding this, can we hold that sub-s. 1 of s. 236 applies in respect of foreign ships? We think it is impossible so to hold. The words "seaman" and "ship" in sub-s. 1 must have the same limited meaning as in sub-s. 2.

This view is in accordance with the decision of the Court of Queen's Bench in the year 1860, in the case of *Leary* v. *Lloyd* (1), upon the parallel section—257—of the Act of 1854. We have, however, not held ourselves concluded by that decision, but have reconsidered the matter upon the following grounds: first, that case was only argued on one side; secondly, Blackburn J., who delivered the judgment of the Court, seems to have thought that there was something special in the sections about discipline limiting their application, though possibly not the application of the other sections in the other part of that Act, to British ships, and we think this is not so; thirdly, the case of *The Milford* (2) was not brought to the notice of the Court. Now, the case of *The Milford* (2) is certainly an authority for not restricting Part III. of the Merchant Shipping Act, 1854, to British ships. Dr. Lushington, in dealing with the argument that s. 109 of the Act of 1854 restrained the

(1) 3 E. & E. 178.

(2) Swabey, 362.

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application of s. 191, says: "The language there used, however, is affirmative, stating the cases to which the third part of the Act shall extend; there are no negative words which tend to shew that the Court should not apply s. 191 to foreign masters and seamen." This observation is perfectly general, and the authority of Dr. Lushington on shipping matters and on the construction of the Merchant Shipping Act was so high that it is unfortunate that *The Milford* (1) was not brought before the Court of Queen's Bench before it decided *Leary* v. *Lloyd*. (2) It should be added that the law as decided in *The Milford* (1) has been accepted ever since, and that the remedies given by s. 191 were, and those of the corresponding section (s. 167, sub-s. 1) of the Act of 1894 are, always afforded in proper cases to the masters of foreign ships. On the other hand, it may be said that Dr. Lushington's judgment may well be supported on other grounds, and that he relied on other grounds as well. The decision may rest upon the ordinary rule as to the application of the lex fori. Again, the effect of s. 191 was to enable the master to sue in the Admiralty Court, and thereby to obtain process in rem against the ship. By the ordinary maritime law, as administered in other countries, he had this right always, just as a seaman had. The English law had been exceptional in denying him this remedy, and in denying it to him because of a point of internal jurisdiction. When s. 191 brought the maritime law of this country into line with that of other countries, it would have been absurd that the anomaly thus removed for municipal cases should have been left for foreign ones. These considerations certainly affect the weight of *The Milford* (1) as an authority in the present case. On the other hand, the case of *Cope* v. *Doherty* (3), and the class of cases represented by *The Zollverein* (4), shew that there were other parts of the Merchant Shipping Act, 1854, which our Courts have declined to hold to be applicable to foreign ships.

We do not, however, decide this case upon the ground that no sections in Part II. of the Act of 1894 apply to foreign ships. We agree with Darling and Channell JJ., in the case of *Reg.* v.

(1) Swabey, 362.
(2) 3 E. & E. 178.
(3) 2 De G. & J. 614.
(4) (1856) Swabey, 96.

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Stewart (1), that there may be acts done in relation to foreign ships which, when done by English subjects in England, come as much under the penal provisions of the Merchant Shipping Act, 1894, as if they were done in relation to English ships. We think that the case they had to deal with was one of such cases. We ground our decision upon the fact that this part of the Act (Part II.) contains a special provision for the case of desertion from foreign ships, and has thus shewn that its general provisions are limited to desertion from British ships.

We hold, therefore, that the appellant was not liable to be convicted under s. 236 of the Merchant Shipping Act, 1894, and that the appeal must be allowed with costs.

Judgment for appellant.

Solicitors for appellant: *Riddell & Co., for J. H. Jones, Cardiff.*

Solicitor for respondent: *Hier Jacob, for H. M. Rees, Cardiff.*

(1) [1899] 1 Q. B. 964.

J. F. C.

[IN THE COURT OF APPEAL.]

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July 1.

ANTONIADI *v.* SMITH.
SMITH, CLAIMANT.

Bill of Sale—Registration not renewed—Apparent Possession—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 8, 11—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43).

The owner of furniture in a house of which he was the occupier, and in which he resided, granted an absolute bill of sale in respect of the furniture to his mother-in-law, who lived in the same house. This bill of sale was duly registered in the first instance, but the registration was not renewed as required by the Bills of Sale Act, 1878, s. 11. The grantee under this bill of sale subsequently gave a bill of sale in respect of the same goods by way of mortgage to secure an advance. This bill of sale was duly registered. The goods, which remained in the same house, in which the grantor of the first-mentioned bill of sale and his mother-in-law continued to reside, were subsequently taken in execution on a judgment against the said grantor, and were claimed by the grantee of the second bill of sale. On interpleader proceedings between the execution creditor and the claimant:—

Held (affirming the judgment of a Divisional Court), that the case was governed by *Cookson* v. *Swire*, (1884) 9 App. Cas. 653, and that the claimant was entitled to the goods as against the execution creditor.

APPEAL from the judgment of a Divisional Court (Lord Alverstone C.J. and Lawrance J.) on an appeal from the judgment of a county court judge on an interpleader issue.

Goods, which had been taken in execution on a judgment obtained by Antoniadi against J. Melland Smith, were claimed by H. W. Smith under a bill of sale, and an interpleader issue in the county court was directed to try the question to whom the goods belonged. On October 14, 1893, the execution debtor by an absolute bill of sale assigned the goods in question, which consisted of furniture in the house of which he was the occupier and in which he resided, to Ellen Melland, his mother-in-law, who lived with him in the same house. This bill of sale was duly registered in the first instance, but the registration had never been renewed as required by the Bills of Sale Act, 1878, s. 11. On March 8, 1894, Ellen

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Melland gave a bill of sale of the goods by way of mortgage to one Price to secure a loan. That bill of sale was duly registered, and was re-registered on March 7, 1899. On November 14, 1900, Mrs. Melland gave to H. W. Smith, the claimant, a bill of sale of the goods by way of mortgage to secure an advance of money by him, out of which the loan to Price was repaid. This bill of sale was duly registered. The goods which had all along remained in the same house, in which the execution debtor and Mrs. Melland had continued to reside, were subsequently taken in execution as before mentioned. The county court judge gave judgment in favour of the claimant. The Divisional Court affirmed his decision.

Cababé, for the execution creditor. The judgment of the county court judge was wrong. The bill of sale given to the claimant was void as against an execution creditor by reason of the original bill of sale given to Mrs. Melland not having been re-registered, and the goods having remained in the apparent possession of the execution debtor. The whole object of the Bills of Sale Acts would be defeated, if the grantee of a bill of sale that was void as against execution creditors for want of registration could give a good title to the goods as against an execution creditor to the holder of a bill of sale subsequently granted by him. If Mrs. Melland would have no title against an execution creditor at whose suit the goods were seized, how can she give a title to the claimant? The case of *Karet* v. *Kosher Meat Supply Association* (1) is directly in point. *Cookson* v. *Swire* (2) is distinguishable, because there the grantees of the first bill of sale sold the goods out and out under the power of sale given by it, and it was held that, the bill of sale having become absolutely satisfied, it was a spent document, and its non-registration had no effect on the title under the second bill of sale. The first bill of sale in the present case cannot be looked on as a spent document.

Le Riche, for the claimant. *Karet* v. *Kosher Meat Supply Association* (1) is distinguishable, for there all that was held was that the mere fact that the grantee of a bill of sale had assigned

(1) (1877) 2 Q. B. D. 361. (2) 9 App. Cas. 653.

his interest did not do away with the necessity for renewal of the registration. That decision has no application to the present case, where the intermediate bill of sale given to Price and the bill of sale given to the claimant were both of them duly registered. *Cookson* v. *Swire* (1) really governs the present case. The bill of sale given by the execution debtor being an absolute bill of sale is not within the Bills of Sale Act, 1882, and it could only be void under s. 8 of the Bills of Sale Act, 1878, as against execution creditors and trustees in bankruptcy, if the goods remained in the apparent possession of the grantor. At the time when Mrs. Melland gave the bill of sale to the claimant, her title was good, there being then no person entitled to avoid it under s. 8 of the Act of 1878. Secondly, the goods were not in the apparent possession of the execution debtor. They must be taken under the circumstances to have been in the actual possession of Mrs. Melland. She lived in the house in which the goods were, and what possession could she have had other than she had? See *Ramsay* v. *Margrett*. (2) Sect. 4 of the Bills of Sale Act, 1878, shews what the Act means by "apparent possession." It provides that the goods shall under certain circumstances be held to remain in the "apparent possession" of the grantor, "notwithstanding that formal possession thereof may have been taken by or given to any other person." Here there was no question of giving formal possession of the goods to Mrs. Melland. She had actual possession of them, living as she did in the same house, as much as she would have had if she had bought them at a shop, and had them sent home to her there.

There is no finding by the county court judge that the goods were in the apparent possession of the execution debtor, and the onus is on the execution creditor, who seeks to upset the primâ facie title shewn by the claimant, to establish this.

Cababé, in reply. The county court judge has, no doubt, not found specifically as to the possession of the goods. But he appears really to have decided the case on the question of law with regard to the necessity for re-registration of the first bill of sale. It is submitted that it is clear on the facts

(1) 9 App. Cas. 653. (2) [1894] 2 Q. B. 18.

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that the goods were in the apparent possession of the execution debtor. He was the occupier of the house; the goods were originally his furniture, and there was nothing to shew any change of possession. It is submitted that, if the Court thinks that question doubtful, they should send the case back to the county court to have that question determined.

VAUGHAN WILLIAMS L.J. I am of opinion that the judgment of the Divisional Court and that of the county court judge were correct. In the year 1893 the execution debtor gave to Mrs. Melland, his mother-in-law, an absolute bill of sale in respect of the goods in question. That being an absolute bill of sale, it is clear that the law with regard to it is contained in the Bills of Sale Act, 1878, which by s. 11 requires that there shall be a renewal of the registration every five years. That bill of sale was duly registered in the first instance, but there was no renewal of the registration subsequently. There was an intermediate bill of sale given by Mrs. Melland to one Price, but I do not know that that is of any great importance except as a connecting link in the history of the case. Presently, Mrs. Melland, being minded to pay off Price, obtained from the claimant a loan of money for that purpose, and, in consideration of that advance, she granted to him a bill of sale of the goods by way of mortgage. That bill of sale being granted by way of mortgage is governed by the Bills of Sale Act, 1882, and it has been duly registered under that Act. Subsequently the goods comprised in that bill of sale were taken in execution at the suit of the execution creditor, and an interpleader issue was directed to try the title to the goods. The grantee of the last-mentioned bill of sale has as claimant to state what his title is, and he sets up that bill of sale, and says that it is duly registered. Primâ facie that is a good title. But the execution creditor in answer to it says that the claimant traces his title from Mrs. Melland, whose title was based upon the absolute bill of sale, the registration of which was never renewed as required by the Bills of Sale Act, 1878. That, no doubt, is true; but the answer made by the claimant is in my opinion conclusive. He says that, although the

registration of that bill of sale never was renewed, at the date when the bill of sale by way of mortgage was granted to him by Mrs. Melland there was no person entitled to claim the goods as against her as execution creditor or trustee in bankruptcy; and that the Bills of Sale Act, 1878, does not make an unregistered bill of sale void in favour of every one, but only in favour of certain persons, such as execution creditors or trustees in bankruptcy; and that under these circumstances the decision in the case of *Cookson* v. *Swire* (1) absolutely covers the present case. In that case the first bill of sale was defeasible for the same reason as the bill of sale granted to Mrs. Melland in the present case, namely, for want of renewal of the registration. The grantee under that defeasible bill of sale sold under the power of sale given to him by the bill of sale to a purchaser who, not being able to pay the purchase-money down, gave a fresh bill of sale in respect of the goods, which was duly registered; and it was held that, inasmuch as there was at the date of the sale no person in existence who under the Bills of Sale Act, 1878, was entitled to avoid the first bill of sale, the effect of the sale was to put an end to the original bill of sale as an operative document and to make it a spent document. It seems to me that under the circumstances of the present case we ought to arrive at the same conclusion, but in this case the conclusion in favour of the claimant is fortified by the consideration that under the Bills of Sale Act, 1878, there is no need of registration unless the goods remain in the apparent possession of the grantor. Now can it be said that the goods here in question remained in the apparent possession of the execution debtor? It seems to me that there are two answers to the suggestion that they did so remain. In the first place, in order that the execution creditor may rely on the absence of registration of the bill of sale, he must make out that the circumstances were such as to render registration necessary, and he ought to have obtained a clear finding from the county court judge that the goods were in the apparent possession of the execution debtor. This he has not done. In addition, it seems to me that under the circumstances it would

(1) 9 App. Cas. 653.

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be useless to send this case back to the county court for retrial on that point, on the ground that there has been an oversight and the facts have not been sufficiently ascertained; for I think that upon the evidence as given there is nothing whatever to displace the actual possession of Mrs. Melland, which I should infer to have existed, in the absence of evidence to the contrary, from the fact that she was living all along in the house in which the goods were, though no doubt the execution debtor lived there also. I think that it would require some cogent evidence to rebut that inference, and to shew that the goods were in the apparent possession of the execution debtor; and so far as I can see there is no suggestion of such evidence here. Moreover, one must not forget that s. 4 of the Bills of Sale Act, 1878, gives a definition of apparent possession; and I think that, having regard to the terms of that definition, it would be a difficult thing to prove apparent possession of the grantor where there is anything in favour of the grantee beyond a mere formal taking of possession by him. Under these circumstances, I think it would be useless to send the case back for a new trial, and more especially I think that we ought not to do so because a small amount only is involved.

A. L. SMITH M.R. concurred.

STIRLING L.J. I am of the same opinion. I only wish to add a word or two with regard to the case of *Karet* v. *Kosher Meat Supply Association*. (1) I think that the argument based upon that case is disposed of by what Lord Selborne said in *Cookson* v. *Swire*. (2) In that case the original bill of sale was not at the time when the execution was levied properly registered. Lord Selborne said, speaking of what took place in that case: "It seems to me, therefore, that it is quite impossible to say that a spent transaction of that kind—for that bill of sale is as entirely spent as if it had been null and void to all intents and purposes independently of the Act—can be revived, as it were for the purpose of being destroyed, to let in, as against

(1) 2 Q. B. D. 361. (2) 9 App. Cas. 653, at p. 663.

the true title, a subsequent execution creditor. It is not sufficient to say that the same thing might have happened if it had been an absolute transfer by bill of sale. I assume that it might have been, and I agree that the argument probably would have been the same. If the subsequent transferee in that case, as in this case, leaves the goods in the apparent possession of the person who is the grantor of the original bill of sale, and himself does not register his own title, if his title is by an absolute bill of sale, or if he grants a title to somebody else, whether absolute or conditional, and, if that person does not register it, then he in the one case, and his assignee in the other, will be liable, no doubt, to have his title defeated by a subsequent execution; not because the person to whom the first bill of sale was given has not registered it, but because the person who has got the second bill of sale has not registered it, and leaves it in a position of danger." Here the claimant has had his bill of sale properly registered, and therefore he has not left it in a position of danger within the meaning of Lord Selborne's words.

Appeal dismissed.

Solicitor for execution creditor: *W. H. Lane.*
Solicitor for bill of sale holder: *Arthur Price.*

E. L.

C. A.
1901
July 9.

[IN THE COURT OF APPEAL.]

WALDOCK *v.* WINFIELD.

Master and Servant—Negligence of Servant—Servant of one Person lent to another—Control of Servant.

A company, which carried on the business of iron-founders, entered into a written contract with the defendant for the hire from him of a van, horse, and driver, for the purpose of delivering goods to their customers. The contract provided that the defendant was to supply a capable man to drive and take charge of the van and horse, that the man in defendant's employ, and all charges and claims whatsoever in reference to the van, horse, and man were to be paid for by the defendant, who was to be responsible for the same, and that the company were only to be responsible for the payment for the van, horse, and man at a certain rate per annum by monthly payments. The driver of a van supplied to the company by the defendant under the above-mentioned contract was guilty of negligence when delivering a girder at the premises of a customer of the company, by which the plaintiff, a servant of the customer, was injured. There was no evidence that any one representing the company exercised any control over the driver in respect of the delivery of goods for the company:—

Held, that, upon the true construction of the contract, the implication was that the control of the driver, when delivering goods for the company, remained in the defendant, and that the defendant was therefore liable for his negligence.

Application by the plaintiff for judgment or a new trial in an action tried before Darling J. and a jury.

The action was brought to recover damages for personal injuries sustained by the plaintiff through the negligence of the defendant's servant.

The plaintiff was a workman in the employment of a man named Webber. A company called Measures Brothers, Limited, who were iron-founders, had entered into a written contract with the defendant, who was a carman and contractor, for the hire from him of two vans, horses, and drivers for the purpose of delivering goods to their customers. The contract was in the following terms: "Hire of horse, van, and man. Single-horse van to be capable of carrying two tons each, pair-horse van to be capable of carrying four tons each. Mr. W. Winfield

agrees to supply vans to arrive at 6.30 A.M. each working morning in complete working order with good capable men to drive and take charge of same: vans, horses, and all necessaries being the property of Mr. W. Winfield: the men in his employ, and all charges and claims whatsoever in reference to the vans, horses, and men being paid for by Mr. W. Winfield, and he to be responsible for same: we only to be responsible for the due payment at the rate of 420*l.* per annum for one pair and one single horse van and man, payments being made in equal monthly proportions at the rate of 35*l.* per month; and should any additional horses and vans be required, rates to be agreed to from time to time. Measures Brothers, Limited."

On September 4, 1899, the defendant, in pursuance of the contract, sent a van and horse in charge of a man in his employ named Dickinson to the premises of Measures Brothers, Limited, where Dickinson was directed to take some girders in the van to Webber's premises, which he accordingly did. The girders were secured in the van by a chain. When the van arrived at Webber's premises, his foreman sent for some men to assist in receiving the girders out of the van; but, before they came, Dickinson negligently unfastened the chain, the result being that one of the girders fell out of the van, and struck the foot of the plaintiff, who was standing by ready to assist in unloading the girders, and inflicted on him the injuries in respect of which the action was brought. There was no evidence to shew that on this or any other occasion any one representing Measures Brothers, Limited, ever was present at or exercised any control over the delivering of goods from the vans. The jury, in answer to questions left to them by the learned judge, found (1.) that Dickinson was at the time of the accident engaged in delivering at Webber's works the girder that he had received from Measures Brothers with instructions from them to deliver it there; (2.) that the defendant had parted with the control of his servant Dickinson at the time of the accident in the matter of unloading the girder. The jury assessed the damages provisionally at 150*l.* The learned judge on the findings of the jury entered judgment for the defendant.

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McCall, K.C., and *Ringwood*, for the plaintiff. Dickinson was for general purposes the servant of the defendant, and therefore, in the absence of evidence that for the particular occasion the defendant had parted with the control of his servant to Measures Brothers, and that the servant was being controlled by them, the defendant would be liable for Dickinson's negligence. It is submitted that it is clear on the terms of the contract that all that Measures Brothers had a right to do was to direct the defendant's men what goods they were to take and to whom; and it was not intended that they should exercise any control with regard to the mode in which the defendant's men performed the work. Measures Brothers did not select the men, and had no power of dismissing them for misconduct or incompetence, and nobody on their behalf gave any directions as to, or interfered in any way with, the delivery of the goods by the defendant's men. This case, therefore, comes within the decision in *Jones* v. *Liverpool Corporation* (1), and is distinguishable from such cases as *Rourke* v. *White Moss Colliery Co.* (2), where it was expressly provided that the contractor to whom the defendants' servant was lent should have control over him, and *Donovan* v. *Laing, Wharton and Down Construction Syndicate, Limited* (3), where control was exercised over the man in charge of the crane, not by the defendants, but by the wharfingers to whom the crane was lent. It is obvious that Measures Brothers had no right to give directions to Dickinson as to the management of the horse and van, which shews that he remained the defendant's servant.

[They also cited *Quarman* v. *Burnett* (4); *McLaughlin* v. *Pryor* (5); *Murray* v. *Currie* (6); *Jones* v. *Scullard*. (7)]

C. A. Russell, K.C., and *A. H. Carrington*, for the defendant. For the purpose of the application of the doctrine "Qui facit per alium facit per se" a man cannot have two masters. To ascertain whose servant Dickinson was at the time when the accident happened, one must look at the work which he was

(1) (1885) 14 Q. B. D. 890.
(2) (1877) 2 C. P. D. 205.
(3) [1893] 1 Q. B. 629.
(4) (1840) 6 M. & W. 499.
(5) (1842) 4 M. & G. 48.
(6) (1870) L. R. 6 C. P. 24.
(7) [1898] 2 Q. B. 565.

then engaged in doing. The cases shew clearly that a man who is for general purposes the servant of one person may for a particular occasion be lent to and become the servant of another. At the time when the accident happened Dickinson was doing Measures Brothers' work. It was their business to deliver their goods to their customers. They might have performed that business by their own vans, horses, and men, but, not having vans, horses, and men available, they hired them from the defendant. In delivering the girder at Webber's premises, Dickinson was doing Measures Brothers' work as their servant for that occasion. It is submitted that, on the true construction of the contract, there is nothing in it to shew that Dickinson was to remain under the defendant's control in respect of the delivery of goods by Measures Brothers' instructions to their customers. The contract no doubt provides that the defendant is to be responsible for all charges in respect of the vans, horses, and men, Measures Brothers being only responsible for the payment of so much per annum by monthly payments for the hire of the vans, horses, and men; but that provision, it is contended, has nothing to do with responsibility for control of the men in doing Measures Brothers' work. If a person takes over for his own purposes the servant of another, the servant so taken over is his servant for the particular occasion. There is a great distinction between the management of the horse and van, which were the property of the defendant, and in managing which Dickinson no doubt acted as the defendant's servant, and the delivering of the goods, which belonged to Measures Brothers, and which it was their business to deliver. The fact that Measures Brothers did not select and could not discharge Dickinson is not material, for that is always the case where a man who is for general purposes the servant of one person is lent for a particular occasion to another. If Measures Brothers disapproved of the conduct of Dickinson, they could have refused to let him take charge of their goods, and sent him back to his master.

[In addition to the cases already referred to, they cited *Johnson* v. *Lindsay & Co.* (1)]

McCall, K.C., for the plaintiff, in reply.

(1) [1891] A. C. 371.

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A. L. SMITH M.R. In this case the plaintiff sues the defendant to recover damages for injuries which he sustained through the negligence of one Dickinson. The case was tried before Darling J. and a jury. The learned judge left certain questions to the jury, and, upon their answers to those questions, he entered judgment for the defendant. The plaintiff now applies to have judgment entered for him for the sum of 150*l.*, at which the jury provisionally assessed the damages. In my opinion the result of the action really depends in this case upon the construction of the written agreement between the defendant and Measures Brothers; and I think that, upon the terms of that agreement, the plaintiff is entitled to have judgment entered for him. The question arises in this way. Measures Brothers having girders and other heavy articles which had to be delivered to their customers, and not having vans and horses of their own available for the purpose, and the defendant having vans and horses suitable for the carriage of such articles, the agreement was made between the defendant and Measures Brothers, upon which, as I have said, in my opinion the case turns. The circumstances out of which the cause of action arose were as follows. Under the agreement the defendant had sent to the premises of Measures Brothers a van, of which Dickinson was the driver. Dickinson, while engaged in carrying out the work under the agreement, without any intervention on the part of any one representing Measures Brothers, went to the yard of the plaintiff's employer with the van, for the purpose of delivering some girders there, and, in the process of unloading the girders, the plaintiff was injured through the negligence of Dickinson. The question is whether the defendant is liable for that negligence.

It is argued that, when the accident happened, Dickinson, though for general purposes the servant of the defendant, was for the particular occasion the servant of Measures Brothers, and that they were liable for his negligence. The agreement under which the work of delivering the girders was being done was as follows. By it the defendant agrees to supply vans to arrive at Measures Brothers' premises at 6.30 A.M. each working morning during the year, "in complete working order, with good and capable men to drive and take charge of same." I

think that means to take charge of the vans and the work which they are to perform after they arrive at Measures Brothers' premises. The agreement then proceeds: "vans, horses, and all necessaries being the property of Mr. W. Winfield; the men in his employ, and all charges and claims whatsoever in reference to the vans, horses, and men being paid for by Mr. W. Winfield, and he to be responsible for same." The words "the vans, &c., being the property of Mr. W. Winfield" seem to me to point to the conclusion that the intention was that the hirers were to have nothing to do with their management, and I think that the words "he to be responsible for same" mean not merely that he is to be responsible for the payment of the men and all charges, but that he is to be responsible for the management of the vans and horses by his men. The words would be mere tautology if they referred to the payment of the men and charges in reference to the vans, horses, and men. It seems to me that those words are put in expressly to negative the idea that the men who drive the vans are to be Measures Brothers' servants or under their control, and to provide that the defendant shall be responsible for their control. The sole limit of Measures Brothers' responsibility is expressed by the next clause, which is as follows: "We only to be responsible for the due payment at the rate of 420*l.* per annum for one pair and one single horse van and man, payment being made in equal monthly proportions at the rate of 35*l.* per month." In my opinion the meaning of this agreement clearly is that the driver of the van is not to be the servant of Measures Brothers, or under their control, but is to remain the servant of the defendant. I rest my judgment on the terms of this agreement which differentiate this case from such cases as *Rourke* v. *White Moss Colliery Co.* (1) and *Donovan* v. *Laing, Wharton and Down Construction Syndicate, Limited* (2), and other cases which have been cited. There is no evidence that any one representing Measures Brothers intervened in any way with regard to the unloading of the van. In these circumstances I am of opinion that the contention that Measures Brothers were liable for Dickinson's negligence fails, and the

(1) 2 C. P. D. 205. (2) [1893] 1 Q. B. 629.

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plaintiff is entitled to judgment against the defendant for the damages assessed by the jury.

VAUGHAN WILLIAMS L.J. I agree. The question in this case in my opinion is, Under whose control must Dickinson be taken to have been when the accident happened? Was he under the control of the defendant, or that of Measures Brothers? In order to answer that question, I think we must look at the written contract between the defendant and Measures Brothers. I agree in the construction which the Master of the Rolls has put upon that contract. I wish, however, to add a few words for myself with relation to it. In construing this contract, as in the case of other contracts, the surrounding facts must be taken into consideration. I am not speaking of any oral bargain made, or anything said or done between the parties; but regard must be had to such matters as the nature of the work to be done under the contract. In this particular case the contract was one for the supply of a van, horse, and man by the defendant to Measures Brothers, and I see nothing in the surrounding facts to lead us to put on the words of the contract any other than their natural construction. To illustrate my meaning: suppose the contract had been one for work to be done in relation to the loading or unloading of a ship; it might be that under those circumstances one would be bound in construing the contract to bear in mind what is necessarily the position of the master or other officer of the ship with regard to the exercise of control over the operation of loading or unloading the ship. But in the present case there is nothing, so far as I can see, in the nature of the work which gives rise to the necessity for interference on the part of Measures Brothers. By the contract the defendant agrees, not only to supply the vans in complete working order, by which I understand to be meant, with all the necessary tackle for securing the things loaded in the vans, but also to supply them "with good capable men to drive and take charge of same." I think that, on those words alone, I should draw the inference that the intention was that the person supplying the vans was to make himself responsible for

the management of them during the performance of the work. I think the words "take charge of same" would include doing what was necessary to be done by the carman for the purpose of loading and unloading the vans. The next words, namely, "vans, horses, and all necessaries being the property of Mr. W. Winfield," are a little difficult to explain, but they look to me like a reason for the next provision, which is as follows, namely, "the men in his employ, and all charges and claims whatsoever in reference to the vans, horses, and men being paid for by Mr. W. Winfield, and he to be responsible for same." Though the word "being" is used, I think it clearly means "to be." If so read, it seems to me that the natural meaning of the clause is that the defendant is, not only to pay the men in his employ and all charges and claims whatsoever in reference to vans, horses, and men, but he is to be responsible for the same, by which I think is meant, for the vans, horses, and men. I do not know that there is any other part of the contract to which I need refer. What I have referred to seems to me sufficient to shew that, as between the defendant and Measures Brothers, the defendant was to have the control of his servants while doing the work. We have had cited to us a great many cases, such as *Rourke* v. *White Moss Colliery Co.* (1) and *Donovan* v. *Laing, Wharton and Down Construction Syndicate, Limited.* (2) I do not think that, having regard to the terms of the contract in this case, we need trouble ourselves very much with the discussion of those cases; but, if one had to deal with the question who had the control of Dickinson in the particular duty he was performing, independently of the terms of the written contract in this case, I should wish to point out that, in every case in which a person has been held to be in control of a servant, who for general purposes was the servant of some one else, there has been some fact or clause of an agreement which led to that conclusion. In *Rourke* v. *White Moss Colliery Co.* (1) there was the express provision that the engineers were to be under the control of the contractor. In *Donovan* v. *Laing, Wharton and Down Construction Syndicate, Limited* (2) the nature of the

(1) 2 C. P. D. 205. (2) [1893] 1 Q. B. 629.

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work which had to be done, namely, the unloading of a ship by means of a crane, was such as to necessitate the interference of the wharfingers, to whom the crane and the man in charge of it were lent, and who did in fact interfere. Therefore, speaking for myself, even if the contract here had not been conclusive of the question, I should have hesitated to hold that in this case there was anything in the facts or the nature of the work to lead to the conclusion that Dickinson was necessarily under the control of Measures Brothers, so that, in delivering things for them at the various places to which he was sent, he was their servant.

STIRLING L.J. I am of the same opinion. The defendant in this case is sued on the ground that a carman named Dickinson, by whose negligent act the plaintiff was injured, was at the time of the accident acting as the defendant's servant. The question which has to be determined is whether he was so acting or not. That question is one of some difficulty; but it appears to me, as it has appeared to the Master of the Rolls and my brother Vaughan Williams, that it must be determined by reference to the written contract which was entered into between the defendant and Measures Brothers, the persons whose servant the defendant alleges Dickinson to have been. The question, therefore, is one of law on the construction of the contract, there being no other evidence as to the employment of Dickinson than that afforded by the written contract. On the terms of that contract I come to the conclusion that Dickinson was acting as the defendant's servant, and not as the servant of Measures Brothers. I will not read the clauses of the contract again, but I would refer especially to the words "the men in his employ, and all charges and claims whatsoever in reference to the vans, horses, and men being paid for by Mr. W. Winfield, and he to be responsible for same." The words "the men in his employ" seem to me to imply, if they do not express, that the employment of the men was as the servants of the defendant and not of Measures Brothers. That implication is strengthened by the clause which follows, namely, "he to be responsible for same," by which I think is

meant, responsible for the vans, horses, and men. If the responsibility for the men is cast on the defendant, then I think it must have been intended that the control of them should remain with him. I think that the general effect and scope of the agreement is that the defendant is to do the cartage required by Measures Brothers, and that, in carrying out that contract, everything connected with the doing of the work, the taking charge of the vans, and their loading and unloading, is to be under the orders of the defendant, with whom the responsibility is to rest. That being in my opinion the meaning of the contract, I am unable to agree with the view taken by the learned judge with regard to it, and think that there was really no question to leave to the jury at all. I will only add that in my view the fact that Measures Brothers had power to direct what work was to be done did not confer on them the right of directing in what way it was to be done, as is shewn by the decision in the case of *Jones* v. *Liverpool Corporation* (1), which was approved of in *Donovan* v. *Laing, Wharton and Down Construction Syndicate* (2) and appears to me to be a strong authority in favour of the conclusion at which we have arrived.

Application allowed.

Solicitors for plaintiff: *Barton & Pearman.*
Solicitors for defendant: *Easton & Cargill.*

(1) 14 Q. B. D. 890. (2) [1893] 1 Q. B. 629.

E. L.

1901
May 16;
June 19.

DAVIDSSON *v.* HILL.

Compensation for Death—Alien—Negligence of British Subject—Cause of Action arising on High Seas—Fatal Accidents Acts, 1846 *and* 1864 (9 *&* 10 *Vict. c.* 93; 27 *&* 28 *Vict. c.* 95).

The Fatal Accidents Acts, 1846 and 1864, apply as well for the benefit of the representatives of a deceased foreigner as for those of a British subject, at all events as against an English wrong-doer.

A collision occurred upon the high seas between a British and a foreign ship owing to the negligence of those in charge of the former. As a result of the collision a foreign seaman on board the foreign ship was drowned:—

Held, that the personal representative of the deceased seaman had a right of action by the said Acts against the owners of the British ship.

Adam v. *British and Foreign Steamship Co.*, [1898] 2 Q. B. 430, dissented from.

ARGUMENT of a point of law upon an agreed statement of facts.

1. Between 2 and 3 A.M. on August 11, 1900, a collision occurred on the high seas between the defendants' steamship *Exeter City*, which is a British ship, and the Norwegian barque *Ratata*. Shortly after the said collision and in consequence thereof the *Ratata* sank, and Johann Davidsson, a Norwegian subject, employed as sailmaker on board the *Ratata*, was drowned.

2. The said collision and the consequent drowning of the said Johann Davidsson were solely caused by the negligent navigation of the *Exeter City* by the defendants' servants.

3. The plaintiff, Josefina Davidsson, is the lawful widow of the said Johann Davidsson, deceased, and brings this action under the provisions of the statutes 9 & 10 Vict. c. 93, and 27 & 28 Vict. c. 95, on behalf of herself and the six children lawfully begotten of herself and the said Johann Davidsson, deceased, to recover compensation for his death.

There is no executor or administrator of the said Johann Davidsson, deceased.

The question to be decided by the Court is whether upon the facts stated above the plaintiff is entitled to recover damages in this action.

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J. A. Hamilton, K.C., and *H. Stokes*, for the plaintiff. The benefit of the Fatal Accidents Acts, 1846 and 1864, extends to the representatives of a deceased alien as well as to those of a British subject. The decision of Darling J. to the contrary in *Adam* v. *British and Foreign Steamship Co.* (1) cannot be supported. If the deceased Johann Davidsson had been merely injured and not killed, he could clearly have maintained an action in this country; therefore the case is exactly within the language of s. 1 of the Act of 1846. The object of the legislation was that the wrong-doer should not escape liability by killing his victim. In a variety of cases in which actions have been brought under the Fatal Accidents Act it has been assumed that the Act applied to foreigners, and equally so whether they happened to be plaintiffs or defendants. In *The Guldfaxe* (2) Sir R. Phillimore held that the Admiralty Court had jurisdiction to entertain a suit in rem under that Act against a foreign ship. The question of the defendant ship being a foreign ship was not discussed, the only question being as to the power of the Admiralty Court as distinguished from a Court of Common Law to entertain such an action at all. It was assumed that the action would have lain in personam in the common law courts. *The Explorer* (3) was the converse case, the deceased person being the foreigner. There the point that the Act did not confer any right of action in respect of the death of foreigners caused upon the high seas was expressly taken, and decided against the defendants. In *Harris* v. *Owners of Franconia* (4) the action was brought in the common law court under the same Act by the administratrix of one Sullivan, deceased, whose death resulted from a collision on the high seas caused by the negligence of those in charge of the *Franconia*, which was a German ship. An attempt was made to get an order for service of the writ out of the jurisdiction, and failed because the case was not provided for by the rules of Court. But there could have been no foundation for the argument as to service out of the jurisdiction had it not been conceded that if the foreign owners had been within the jurisdiction they could

(1) [1898] 2 Q. B. 430.
(2) (1868) L. R. 2 A. & E. 325.
(3) (1870) L. R. 3 A. & E. 289.
(4) (1877) 2 C. P. D. 173.

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have been sued. In *Seward* v. *Vera Cruz* (1), where the action was brought in the Admiralty Court under the Fatal Accidents Act against a foreign ship, it was held by the House of Lords that the action would not lie; but the Lords proceeded, not upon the ground that the Act did not apply to foreigners, but upon the ground that the injury to the family of the deceased person killed in a collision at sea could not be said to be "damage done by any ship" within the meaning of s. 7 of the Admiralty Court Act, 1861. They there assumed that but for the difficulty of service of the writ an action could be brought against the owners of a foreign ship in the common law courts.

Balloch (*Laing*, *K.C.*, with him), for the defendants. The decision in *Adam* v. *British and Foreign Steamship Co.* (2), upon which the defendants rely, is correct. The question is whether the language of the Fatal Accidents Act shews a clear intention to confer a new right of action upon foreigners resident out of the jurisdiction. The general principle is that Parliament does not legislate for persons over whom it has no control, either in the way of imposing burdens on them or of conferring benefits, and in the absence of a plain expression of such intention cannot be held to have done so. One class of enactments in reference to which this question has been considered consists of those which have limited the liability of shipowners in cases of damage caused by collision. The language of the Merchant Shipping Act, 1854, in the section relating to that subject, is in terms perfectly general, applying to "any seagoing ship." But it was held in *Cope* v. *Doherty* (3) that it did not apply to the case of a collision between two foreign ships upon the high seas, on the ground that primâ facie English legislation does not affect the rights or liabilities of foreigners. In *General Iron Screw Collier Co.* v. *Schurmanns* (4) it was no doubt held that where a British ship damaged a foreign ship by a collision within the three-mile limit from the shore of the United Kingdom the section did apply; but that decision went upon the ground that the cause of action

(1) (1884) 10 App. Cas. 59.
(2) [1898] 2 Q. B. 430.
(3) (1858) 4 K. & J. 367; 2 De G. & J. 614.
(4) (1860) 1 J. & H. 180.

arose within the territorial jurisdiction. And in *The Wild Ranger* (1) it was held that the owners of a foreign ship found to blame for a collision on the high seas were not entitled to limit their liability under the Act of 1854. It was in view of these decisions that the amending Act of 1862 was passed applying the provision in question to "the owners of any ship, whether British or foreign." A second class of enactments consists of those altering the laws of navigation with regard to the rule of the road, &c. These enactments have been held to apply only to British ships, and not even to them when meeting a foreign ship: *The Zollverein* (2); *The Saxonia.* (3)

There is nothing in the language of the Fatal Accidents Acts to extend its provisions to foreigners resident abroad. The Act of 1846 provides that the action shall be brought in the name of the executor or administrator, which suggests that the right of action is limited to the case of British subjects. There is no express provision to meet the case of a foreigner.

Hamilton, K.C., in reply. The terms "executor" and "administrator" in the Act represent a relation which is common to all civilised countries, although the terms themselves are no doubt English terms of art. The Fatal Accidents Act is primarily an imposition of a liability upon British subjects, though the consequence may be to enlarge the rights of foreigners.

Cur. adv. vult.

June 19. KENNEDY J. In this case I am of opinion that the plaintiff is entitled to our judgment. If the deceased seaman, who came to his death through the negligence of the defendants' servants, had been a British subject, no doubt in my view could have arisen as to the right of the widow to maintain such an action as the present. The action is an action in tort. The defendants, whose servants occasioned the death, are British subjects, and were at the time navigating a British ship, the property of the defendants. Their negligence, and the consequent death of the seaman by drowning, which

(1) (1862) Lush. 553. (2) (1856) Swabey, 96.
(3) (1862) Lush. 410.

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gave rise to the claim, both took place upon the high seas, which, to quote the language of Lord Esher, then Brett L.J., in *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (1), is "the common ground of all countries," and therefore the well-known rule in the case of actions of tort "with regard to the exclusive jurisdiction of a foreign country does not apply."

Does it make any difference that the deceased was not a British subject, but a Norwegian subject? The contention put forward on behalf of the defendants is that the foreign nationality makes all the difference.

Now, in considering how this stands it is, I think, not irrelevant to point out that, if the deceased had been only damaged by the negligence of the defendants' servants and not drowned, he could have prosecuted an action for the negligence in the High Court of Justice, if it be assumed, as it properly must be in order to test the right, that the presence of the defendants in this country, and therefore within the jurisdiction, had prevented any technical difficulty arising as to the service of the proceedings upon them. He could equally have maintained his action if, the circumstances being otherwise the same, the defendants, instead of being British subjects, had been foreigners: see the judgment of Brett L.J. in *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (1), and the judgment of Sir Robert Phillimore in *The Leon* (2), citing the earlier decisions of Dr. Lushington in *The Wild Ranger* (3) and *The Zollverein.* (4) If this be so, it would seem to be rather a strange thing that the foreign nationality of the sufferer by another's negligence, which in no way prejudices his right of action here if he is only hurt and not killed, should form, the circumstances being otherwise identical, an absolute bar to any relief of the sufferer's family under these Acts. The Acts are Acts the express object of which is to create a liability to an action for damages at the suit of relatives who suffer from the death of the deceased person, wherever the act, neglect, or default

(1) (1883) 10 Q. B. D. 521, at p. 537.
(2) (1881) 6 P. D. 148.
(3) Lush. 553.
(4) Swabey, 96.

which causes the death is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof. It is contended, however, by the defendants that such is the law, and the ground upon which it is based is that the Fatal Accidents Acts of 1846 and 1864 must be understood as applicable only to British subjects, and to those persons, whatever be their nationality, who are actually within the territorial jurisdiction of the British Crown. The deceased man, Johann Davidsson, was a Norwegian subject, and, as I understand the statement of counsel, had his home with his family in Norway. The defendants properly rely upon a recent decision of Darling J. in *Adam* v. *British and Foreign Steamship Co.* (1), and there is no doubt that we cannot decide in favour of the plaintiff in the present case without disagreeing with Darling J. in regard to that judgment. It becomes, therefore, my duty respectfully to consider the ground upon which it is based, and to explain why I myself differ from his conclusion. The circumstances there were substantially identical with those of this case. The learned judge in his judgment agrees that there can be no doubt that, had the deceased been an English subject, the action would have lain, notwithstanding that the negligence and death had occurred upon the high seas. He decided against the plaintiff on the ground, as he states (2), that "it is a principle of our law that Acts of Parliament do not apply to aliens, at least if they be not even temporarily resident in this country, unless the language of the statute expressly refer to them." In a later passage of his judgment (3) the proposition is stated in a somewhat modified form: "The intention of the Legislature is to be collected from the statute, and I see no implied, and certainly no express, intention to give to foreigners out of the jurisdiction a right of action which even British subjects had not until the passing of 9 & 10 Vict. c. 93." In support of the proposition thus laid down, Darling J. cites passages from the judgments of Dr. Lushington in *The Zollverein* (4), of Jervis C.J. in *Jefferys*

(1) [1898] 2 Q. B. 430.
(2) [1898] 2 Q. B. 430, at p. 432.
(3) [1898] 2 Q. B. 430, at p. 434.
(4) Swabey, 96.

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v. *Boosey* (1), and of Lord Esher in *Colquhoun* v. *Heddon*. (2) I venture to think that it is very important, in order to judge rightly of the applicability of these expressions of judicial opinions to other cases, to pay careful attention to the kind of case which in each instance gave occasion for the utterance of them. Before proceeding in this direction I will only mention in passing that in *Routledge* v. *Low* (3) Lord Westbury expressed his dissent from the reasoning in *Jefferys* v. *Boosey* (1), the sum of which he states to be "the conclusion that a British statute must be considered as legislation for British subjects only, unless there are special grounds for inferring that the statute was intended to have a wider operation," and that Lord Brougham in his judgment in *Jefferys* v. *Boosey* (1) states the law in more guarded terms than those quoted from the judgment of the Chief Justice in expressing his opinion in the House of Lords: "Generally," he says, "we must assume that the Legislature confines its enactments to its own subjects over whom it has authority, and to whom it owes a duty in return for their obedience. Nothing is more clear than that it may also extend its provisions to foreigners in certain cases, and may without express words make it appear that such is the intendment of those provisions. But the presumption is rather against the extension, and the proof of it is rather upon those who would maintain that such is the meaning of the enactments." If we now look at the cases in which the judicial dicta in question have been uttered, we find in my opinion that in each of them the statutory enactment under consideration was one which related to matter of a special and exceptional kind. In *Jefferys* v. *Boosey* (1) the Act under consideration was the 8 Anne, c. 19, creating the peculiar and special property in literary productions called copyright. In *Colquhoun* v. *Heddon* (4) the statute was an Income Tax Act, and the particular question was the construction of the words "in or with any insurance company existing on the 1st November,

(1) (1854) 4 H. L. C. 815.
(2) (1890) 25 Q. B. D. 129.
(3) (1868) L. R. 3 H. L. 100, at p. 119.
(4) 25 Q. B. D. 129.

1844." In *The Zollverein* (1) the principal statutory provision in view was s. 296 of the Merchant Shipping Act, 1854, which imposed a duty in regard to navigation which had not been imposed by the maritime law, and could not be held in a Court of Admiralty to bind a foreign vessel, and the position is grounded upon the want of equity which there would be in a decision which allowed the foreigner to benefit by a breach of the municipal law to which he could not himself be held amenable. So again in the case of *Cope* v. *Doherty* (2), which is cited to us by the defendants' counsel, the statutory provisions under consideration (the Merchant Shipping Act, 1854, Part IX.) were provisions of a peculiar character in so far as they placed a restriction, limiting liability, upon the general law of nations. Under that general law the owners of a ship injured by the negligent navigation of another are entitled to full damages. But to construe the provisions of the Act of Parliament which created this peculiar restriction as intended to apply to foreigners would be, as Wood V.-C. put it in his judgment, "an attempt" on the part of the British Parliament "to legislate for foreigners by taking away those rights and privileges which they enjoy by the general law which gives full compensation for damages." And even in this case Knight Bruce L.J. in his judgment on the appeal reserved a question whether the Act might not apply if, instead of both the plaintiff's and the defendant's ships being foreign, one had been British: "I assume," he says (3), "the plaintiffs" (the parties who were claiming the limitation) "would have been right if both the *Tuscorora* and the *Andrew Fisher* had been British in ownership and character, all things else being the same, nor do I say whether the plaintiffs would have been right or wrong if one only of the two ships had been of that description, or if the collision had happened in a British river or in a British port." The law as to the limitation of liability is the same as applied to foreign ships as was afterwards dealt with by the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63).

It seems to me that the Fatal Accidents Acts which are

(1) Swabey, 96. (2) 4 K. & J. 367; and on appeal, 2 De G. & J. 614.
(3) 2 De G. & J. at p. 621.

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under our consideration in the present case embody legislation which is of a very different character. The basis of the claim to which they give statutory authority is negligence causing injury, and that is a wrong which I believe the law of every civilised country treats as an actionable wrong. They create, no doubt, a new cause of action (see per Lord Selborne in *Seward* v. *Vera Cruz* (1)), for previously the relatives of the deceased could not in England sue the wrong-doer. The measure of damages is not the same as in an action by the injured man, as the death is an essential constituent of the right of action. None the less, as I venture to think, is it true to say that in substance the purpose and effect of the legislation is to extend the area of reparation for a wrong which civilised nations treat as an actionable wrong. Indeed, the right of redress given is in a sense, according to the decision of Blackburn and Lush JJ. in *Read* v. *Great Eastern Ry. Co.* (2), and of the Divisional Court in *Griffiths* v. *Earl of Dudley* (3), so far identified with the right of the injured man that if death ensues after he has sued and recovered damages the relatives have no cause of action under this legislation. In Scotland (see Bell's Principles of the Law of Scotland) and in most of the American States (see *Ex parte Gordon* (4)) the right of action in the relatives of the deceased person for compensation for his death by the negligence of another is recognised by the law, and I believe, though I cannot quote any authority upon the point, it is also recognised by the law of France and Germany. (5) It appears to me, under all the circumstances and looking at the subject-matter, more reasonable to hold that Parliament did intend to confer the benefit of this legislation upon foreigners as well as upon subjects, and certainly that as against an English wrong-doer the foreigner has a right to maintain his action under the statutes in question. It is not necessary to decide whether—assuming, of course, that no technical difficulty arises as to the service of proceedings—the action could be maintained in the English Courts, the death

(1) 10 App. Cas. 59.
(2) (1868) L. R. 3 Q. B. 555.
(3) (1882) 9 Q. B. D. 357.
(4) (1881) 104 Sup. Ct. U. S. 515.
(5) [See the German Civil Code, s. 823, and at p. 618 below.—F. P.]

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occurring through negligence in a collision upon the high seas, where both parties were foreigners, or where the wrong-doers were foreigners and the sufferers English. My present opinion is that an action could be maintained, but I desire to be understood as not expressing, as it is not necessary to express, a decided opinion upon this point. Here the plaintiff seeks to enforce her claim against an English subject, and I cannot see why she should not do so. If she has not the right we should have the anomaly, as it seems to me, that if a foreigner and an Englishman serving on the same ship were both drowned on the high seas by the same collision negligently caused by an English vessel, the widow of the one could, and the widow of the other could not, obtain by suing the owners of the ship in fault in personam that reparation which our Legislature in these statutes has declared to be a just reparation. Let me add that the view which I take has the weighty authority of Sir Robert Phillimore in *The Explorer* (1), after argument by Mr. R. G. Williams. The decision in *The Explorer* (1) was, no doubt, overruled by the Court of Appeal and the House of Lords in *Seward* v. *Vera Cruz* (2); but, as I understand it, the judgment of the House of Lords is upon a different point altogether, namely, that the Court of Admiralty had no jurisdiction to entertain an action in rem for loss of life under the Fatal Accidents Act. And it will not be wholly, I think, undeserving of notice that in the case of *The Bernina* (3), which was litigated in 1886 and 1887—that is, two years after the decision in *Seward* v. *Vera Cruz* (4)—and was carried up to the House of Lords, one of the two successful claimants of damages under the Fatal Accidents Act in an action in personam against the owners of the wrong-doing ship was, as I have ascertained from the Admiralty Registry, one Habiba Toeg, of Baghdad, the mother of Moses Aaron Toeg, a passenger on a ship called the *Bushire*, who lost his life in a collision caused by the negligence of the defendants' servants in the course of a voyage, and who, as I presume from his name and from his mother's

(1) L. R. 3 A. & E. 289.
(2) 9 P. D. 96; 10 App. Cas. 59.
(3) (1887) 12 P. D. 58; (1888) 13 App. Cas. 1.
(4) 10 App. Cas. 59.

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nationality, was a foreigner. No question of her right to recover on the ground of the nationality either of herself or the deceased was raised by the defendants, and therefore the case is not in any sense a decision in favour of the right. But in a case contested as persistently as this was, it is difficult to suppose that the question would not have been raised had it been one in which the point could be rightly and successfully taken. I am of opinion that judgment must be for the plaintiff.

PHILLIMORE J. I agree with the judgment of my brother Kennedy. We have had to determine whether a foreigner, the widow of a foreign seaman killed on the high seas when navigating on board one of the ships of his own country, by a collision between his ship and a British ship, can maintain an action in England against the English owners of the British ship for the negligence of their servants in causing the collision and death.

I start with the proposition that if the man had not been killed but only injured, he during his life could have maintained an action for damages, such an action being maintainable by the lex fori and by the lex loci delicti commissi, whether the locus be regarded as English or British territory, or as the high seas over which maritime law, or maritime law as administered in this country, prevails. As regards English or British territory this is common knowledge. That such a tort would also be actionable by the law maritime as administered in this country is shewn by *The Ruckers* (1), and by other cases which I am about to cite. I have no doubt that other countries administer the law maritime in the same way. For some proof of it I cite the observations in the American cases of *The Belfast* (2); *Ex parte Gordon.* (3) This not being an action in rem, it is not necessary to shew that the High Court of Admiralty would, while there was such a separate court, have had jurisdiction; but I have no doubt that it would. The principle of the decision in *The Zeta* (4), and the reasoning of

(1) (1801) 4 Ch. Rob. 73.
(2) (1868) 7 Wallace, 624.
(3) 104 Sup. Ct. U. S. 515.
(4) [1893] A. C. 468.

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Lord Herschell, in whose judgment all previous cases are cited, the language of Bruce J. in *The Theta* (1), and the settled practice of the Admiralty Division to allow in proper cases such actions in rem, have concluded this question, the true key to which might have been found long ago in the language of Dr. Lushington in *The Sarah*. (2) I have hitherto not considered one possible lex loci, the law of the foreign ship—in this instance that of Norway. If such a tort were not actionable by the law of Norway, it would be necessary to consider which was the law applicable, whether that of the British ship on which the act of negligence was committed, or that of the foreign ship on which the act was felt, or whether, as his death was in the sea by drowning, general maritime law or maritime law as administered in the English Courts should apply. This matter underwent great discussion in *Reg.* v. *Keyn*. (3) It will be found treated of in the separate judgments of Lindley J. (4), of Denman J. (5), Brett J.A. (6), Bramwell J.A. (7), Lord Coleridge C.J. (8), and Cockburn C.J. (9) It would be necessary also to consider the case of *The Leon*. (10) But till it is otherwise pleaded and proved, I take the law of Norway to be the same as our own.

Having thus established my first proposition, that an injured man could have maintained during his life an action for damages in such a case as the present, I come to apply the Fatal Accidents Act, 1846. This statute enacts as follows: "Whensoever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." These words are wide

(1) [1894] P. 280.
(2) (1862) Lush. 549.
(3) (1876) 2 Ex. D. 63.
(4) 2 Ex. D. at p. 98.
(5) 2 Ex. D. at pp. 101–7.
(6) 2 Ex. D. at p. 148.
(7) 2 Ex. D. at p. 150.
(8) 2 Ex. D. at p. 158.
(9) 2 Ex. D. at pp. 232–38.
(10) 6 P. D. 148.

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enough, and no one doubts that they apply to foreigners in England, or to British seamen as against British shipowners on the high seas. The lex fori is English, and, if the tort be held to be done on the British ship, so also is the lex loci. It has not been pleaded that the law of Norway differs in this respect from ours; and I leave, as before, the possible consequences of such a state of things out of consideration. If the lex loci be the law maritime, I am not sure that it must not now be held that the injury done to the relatives of a dead man by killing the bread-winner is to be deemed an actionable tort by the law maritime. The reasoning of the Supreme Court of the United States in the case of *Ex parte Gordon* (1), and that by the law of Scotland, and, I believe, now the law of many civilised countries, e.g., United States (see *Ex parte Gordon* (1)), France (see Zachariae, ed. 1878, vol. iv. p. 17), and Germany (as I am informed), this action lies, lead me to think that if at one time this tort was not actionable by the law maritime it may yet well be actionable now.

I have still to consider the decision and reasoning of Darling J. in *Adam* v. *British and Foreign Steamship Co.* (2) That decision is in point, and if we decide now in favour of the plaintiff we must disagree with it. It rests mainly, I think, upon the principle that Acts of Parliament are to be deemed not to apply to non-resident aliens unless the Court is compelled so to apply them. There are a number of decisions upon the construction of the Merchant Shipping Act, 1854, which set forth this principle as applicable to the construction of statutes imposing a burden upon a foreigner. Perhaps the strongest of these is *Cope* v. *Doherty*. (3) But even in this case the reservation of Knight Bruce L.J. (4) would make me pause. On the other hand, where it is a case of giving a remedy to a foreigner, the decision of Dr. Lushington in *The Milford* (5), and the constant practice which has followed upon that decision, is the other way. This latter position is, I think, sound. Our courts are not only open, but open equally

(1) 104 Sup. Ct. U. S. 515.
(2) [1898] 2 Q. B. 430.
(3) 2 De G. & J. 614.
(4) 2 De G. & J. at p. 621.
(5) (1858) Swabey, 362.

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to foreigners as to British subjects; and foreigners who have the benefit of the English common law have also the benefit of English statutes. At any rate, where a statute brings the English law into harmony with the law of the foreigner, as in the case of *The Milford* (1), I think this must be so. If an Englishman on board a foreign ship, or a foreigner on board a British ship, is run down by a British ship upon the high seas, it seems almost certain that an action would lie. Are the representatives of a foreigner on board a ship of his own nationality, whose national law would probably give them at least as good a remedy as that given by the Fatal Accidents Act, to be deprived of their right to recover because they must have recourse to statute law instead of to unwritten common law? I think not. Is the law to be different for a Scottish owner of a British ship and the English owner of a British ship? And can it be that as against the owner in this case, if he were a Scotsman, the foreigner could maintain an action because the law of solatium is part of the common law of Scotland, but as against an English owner he cannot because the Fatal Accidents Act is a statutory addition to the common law of England? I think not. There must be judgment for the plaintiff.

Judgment for the plaintiff.

Solicitors for plaintiff: *Stokes & Stokes.*
Solicitors for defendants: *Ince, Colt & Ince.*

(1) Swabey, 362.

J. F. C.

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June 11.

NEW RIVER COMPANY *v.* HERTFORD UNION.

Poor-rate—Waterworks—Indirectly-productive Works—Right to take Water from River—Assessment of Intake.

A waterworks company acquired by Act of Parliament the right to take water from a river upon payment to the conservators of the river of certain sums of money. In exercise of that right they received a flow of water from the river over a piece of land on the river bank in their occupation called an "intake." The company were rated to the relief of the poor in respect of the intake upon an assessment which included, not merely the value of the land and cost of construction of the building upon it, but also the value of the right to take water from the river which was enjoyed in connection with it, which value was represented by the sums paid to the conservators :—

Held, that the assessment was wrong, and that for the purpose of arriving at the rateable value of the intake the value of the right to receive the water could not be taken into consideration.

Liverpool Corporation v. *Llanfyllin Assessment Committee*, [1899] 2 Q. B. 14, distinguished.

CASE stated by the quarter sessions for the Hertford division of the county of Hertford upon an appeal against a poor-rate.

1. The history of the appellant company and of their right to take water from the river Lea is contained in their charter and in the following statutes, which form part of this case :—

3 Jac. 1, c. xviii.

12 Geo. 2, c. xxxii.

The Lea Navigation Improvement Act, 1850 (13 & 14 Vict. c. cix.).

The River Lea Water Act, 1855 (18 & 19 Vict. c. cxcvi.).

The Lea Conservancy Act, 1868 (31 & 32 Vict. c. cliv.).

The Lea Conservancy Act, 1900 (63 & 64 Vict. c. cxvii.).

2. Shortly stated, the facts appearing from the said charter and statutes are as follows :—

3. The appellant company were formed under a charter granted in 1618 by King James I. for the purpose of bringing water from certain springs at Chadwell and Amwell, in the county of Hertford, to London.

4. For many years prior to the year 1738 the appellants had taken considerable quantities of water out of the river Lea, the point of intake being at a place called Chalk Island, in a channel of the river Lea called the Manifold Ditch, from which the water so taken flowed by means of an artificial cutting into the New River.

5. In the year 1738, by the statute 12 Geo. 2, c. xxxii., s. 5, the appellants were permitted to take a specified quantity of water from the river Lea through the Manifold Ditch, and the water running through it was (by s. 11) vested in the appellants, who were directed (by s. 17) to pay to the trustees appointed to carry out the Act two capital sums amounting to 3250*l.*, and two annual sums amounting to 350*l.* All those sums were (by s. 18) to be applied to purposes relating to navigation and purity of the water of the river Lea and the costs of passing the Act.

6. In 1850 the statute 13 & 14 Vict. c. cix. gave the trustees of the river Lea the right to sell surplus water from the river Lea to certain water companies, and the appellants for three years made an annual payment of 1500*l.* for water so purchased by them and supplied at an intake near Tottenham, in the county of Middlesex. The said intake has not been used since the year 1855, but it might still be used.

7. In 1855 by the statute 18 & 19 Vict. c. cxcvi., ss. 4 and 5, the annual payments under the above-mentioned statutes ceased, and in lieu thereof an annual sum of 1500*l.* and a capital sum of 42,000*l.* were directed to be paid by the appellants. In return for the said payments and other payments to be made by the East London Waterworks Company this statute (by s. 9) vested in the appellants and the East London Waterworks Company all the water flowing in the river Lea except so much as was required for navigation. The Act contained provisions for the regulation of the quantity of the water to be taken by the appellants from the river Lea through Manifold Ditch, and required the appellants to construct a new gauge, which gauge with a building to contain the same and with the requisite machinery was erected by the appellants in or about the year 1859 near the point of intake.

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8. In 1868, by the statute 31 & 32 Vict. c. cliv., the appellants were directed (by s. 103) to pay the annual sum of 600*l.* to the corporation of Hertford, and (by s. 131) the appellants and the East London Waterworks Company were directed to pay an additional aggregate yearly sum not exceeding 1000*l.*, of which the appellants were to pay one-third, to the conservators of the river Lea (who by that Act became the successors of the said trustees) for purposes therein specified relating to the purity of the water of the river Lea.

9. Since the year 1868 the appellants have paid to the conservators of the river Lea under the said statutes an annual sum of 1833*l.* 6*s.* 8*d.*, and have paid to the corporation of Hertford an annual sum of 600*l.*

10. By the Lea Conservancy Act, 1900 (63 & 64 Vict. c. cxvii.), s. 25, from and after January 1, 1901, the aggregate yearly sum payable by the appellants and the East London Waterworks Company under s. 5 of the Act of 1855 (referred to in paragraph 7) was increased to 8000*l.*, of which 3750*l.* was to be paid by the appellants, and from and after the same date the additional aggregate yearly sum payable by the two companies under s. 131 of the Act of 1868 (referred to in paragraph 8) was increased to 2000*l.*, and that section was to be read and construed accordingly.

11. The parish of St. John Urban, in respect of which the rate in question was made, was formed under the Local Government Act, 1894, and comprised a portion of the previously existing parish of St. John, Hertford (the part within the borough of Hertford), and in addition thereto a part of the liberty of Little Amwell (such part as was within the borough aforesaid).

12. From 1876 to 1894 the appellants' property in the said parish of St. John was rated at 350*l.*, and in the said liberty of Little Amwell at 500*l.*, and those figures had not been materially altered since 1859.

13. Upon the new parish of St. John Urban being formed, the property of the appellants therein was rated at 350*l.* in respect of that portion which was in the parish of St. John, and at 300*l.* in respect of that portion which was taken from

the old liberty of Little Amwell. The portion left in the old liberty of Little Amwell was rated at 200*l.* The rating of the property of the appellants in the new parish of St. John Urban, therefore, stood at the same valuation as in 1876.

14. Until January, 1900, the said property of the appellants in the parish of St. John Urban had never been assessed at more than 650*l.* rateable value.

15. In January, 1900, by a supplemental valuation list subsequently confirmed by the assessment committee, a further sum of 3180*l.* was added to the rateable value in the assessment of the said property in the occupation of the appellants under an entry in which they were rated for property described as "intake from the river Lea."

16. The appellants duly appealed against the said rate.

17. The appeal came on for hearing on October 15, 1900, when the above-stated facts were approved or admitted.

18. It was further proved and admitted that the said sum of 3180*l.* was arrived at by the professional valuer who made the said supplemental valuation list by taking 4 per cent. upon the capital sum of 42,000*l.* (namely, 1680*l.*) and the annual sum of 1500*l.* directed to be paid under the above-mentioned statute of 1855; but the respondents admitted that, although those sums might be primâ facie evidence, they were not necessarily the measure of rateable value.

19. It was also proved that the actual intake from the river Lea consisted of a certain structure with the land on which it stands; that the appellants had put a grating across the mouth or opening of the Manifold Ditch, where water issues from the river, to prevent timber and other things from floating into the intake; that they had erected posts in the bed of the river to protect the intake, and that they were in occupation of the said posts; and that in and by the item of 650*l.* the said intake grating and posts were rated at their full structural value; that the area of the said land was about 3 poles, and that its annual value as land (apart from its user as an intake) did not exceed 5*l.*, which was also included in the said sum of 650*l.* It is at this point that the specified quantity of water which the appellants are authorized to take from the

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river Lea enters the Manifold Ditch and flows thence into the New River.

20. For the respondents it was contended that, beyond the rating of the intake at its structural value and value as land, it ought to be rated in an additional sum as having an enhanced value in respect of the user made of it by taking water from the river Lea into the channel of the appellants.

21. The appellants contended that no addition ought to be made to the assessment of 650*l.* in respect of the water flowing over the intake, or of the user of the intake by such water flowing over it.

22. The quarter sessions dismissed the appeal.

23. The question for the Court is whether the said hereditament is rateable upon the principle contended for by the respondents.

Marshall, K.C., and *R. D. Muir*, for the appellants. The rule of assessment in the case of property which, like the intake in question, is only indirectly productive of profit is that it is to be assessed upon the cost of the site plus the cost of construction of the buildings upon it: see per A. L. Smith L.J. in *Liverpool Corporation* v. *Llanfyllin Assessment Committee*. (1) But on that principle the value of the right to take the water from the river cannot be taken into consideration as enhancing the value of the intake. It would be as unfair to assess the appellants on the value of that right as to assess a gas company upon the value of all the coal that came in at the gate of the gas-works. The respondents will rely on *Rex* v. *New River Co.* (2), where the water company were held liable to be locally assessed upon the value of land enhanced by the presence of a spring upon it, although they received no profits from the spring in the parish in which it rose. But a spring is part of the produce of the land itself, whereas here the water is not part of the produce of the land.

Ryde, for the respondents. The right to take the water is part of the value of the land. The question is, What rent would a tenant be willing to pay for this intake with the right

(1) [1899] 2 Q. B. 14, at pp. 20, 21. (2) (1813) 1 M. & S. 503.

to receive the water? As the actual occupier must always be included in the possible tenants, the question is, What would the appellants, if they were not in occupation of this intake, give as rent for the right to use it in the way in which they now use it? Clearly the sum they would give would be the figure upon which they have now been assessed. It is like a licence to sell intoxicating liquor, which has always been held to be an element in the rateable value of the house where the liquor is sold.

[BIGHAM J. Because the licence is given in connection with the particular house. But there is nothing in the statutes referred to in the case requiring the company to take the water at this particular intake only.]

It is no objection to the assessment of a railway-station platform that it might have been erected at another place within the limits of deviation. No distinction is to be drawn between the case of receiving water from a spring, as in *Rex* v. *New River Co.* (1), and that of receiving it from a running river. The case of *Liverpool Corporation* v. *Llanfyllin Assessment Committee* (2) is strongly in the respondents' favour. There the corporation were empowered to construct a reservoir which involved the submersion of the sites of a parish church, vicarage, and schools, and were required to erect a new church, &c., in substitution. It was held that in estimating the capital value of the reservoir for the purpose of arriving at its rateable value the amounts expended in providing the new church, &c., ought to be included as being part of the capital cost of the works. That case is on all fours with the present, for no distinction can be drawn between the sums expended in that case in satisfying the corporation's statutory obligation and the sums paid to the conservators in the present.

Marshall, K.C., was not called on to reply.

RIDLEY J. This case is one of some importance, but I think the principle upon which it ought to be decided is abundantly clear, and has now been well established for a considerable period of years. To quote the language of the

(1) 1 M. & S. 503. (2) [1899] 2 Q. B. 14.

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Ridley J.

present Master of the Rolls in a comparatively recent case, *Liverpool Corporation* v. *Llanfyllin Assessment Committee* (1), "Where no profits are earned in the parish by the use of the hereditament, a rough way of arriving at the rateable value by rule of thumb, there being no other way available, is to see what the site and the construction of the works cost, and take a percentage on the capital amount so expended as representing the rent which a tenant would give." The intake in the present case is admittedly not directly productive of profit, and therefore the only things to be taken into consideration are the cost of the site and of the construction of the building upon it. And the case finds that upon that basis the value of the premises is that which appeared in the old assessment, namely, 650*l.*, and no more. But it is contended for the respondents that the right to use the water, which it is said is attached to the land, ought to be taken into consideration, because it is in some way part of the cost of construction of the intake. And in support of that contention the case of *Liverpool Corporation* v. *Llanfyllin Assessment Committee* (1) is relied upon. It was there held that the money required for providing a new church, vicarage, and schools in lieu of those submerged by the construction of the reservoir should be included in the capital cost of the works for the purpose of estimating the rateable value, and it is contended that the money which the appellants have to pay to the conservators of the Lea for the use of the water stands upon the same footing. But with that I cannot agree. The ground upon which the Court of Appeal went in the *Liverpool Case* (1) was that the corporation "could not construct the works which they desired to construct as necessary for the purposes of the water supply to their city without coming under the obligation to provide a new church, vicarage, and schools in lieu of paying a pecuniary compensation for those which would be destroyed by the works." But in the present case the construction of the intake was quite independent of the use of the water, and involved no corresponding obligation. That case, therefore, does not support Mr. Ryde's contention. But

(1) [1899] 2 Q. B. 14.

there is another objection to that contention. The right to take the water is not connected with this particular site. There is power to transfer the intake to other sites, and receive the flow of water from another point on the river's bank. The case to which we were referred of *Rex* v. *New River Co.* (1) is clearly not like the present case. For there the spring which was held to enhance the value of the land was the product of the soil and was a part of the land itself, which the right to receive a flow of water from the river is not. I am of opinion that the decision of the quarter sessions was wrong, and that the assessment ought to be reduced to the former figures.

BIGHAM J. I am of the same opinion. The rule in a case of this kind is that the value of the land and the cost of the construction of the works or buildings shall be ascertained, and the assessment fixed upon a percentage of the amount of those two items. But a question sometimes arises as to what the cost of construction includes. Such a question arose in the *Liverpool Case* (2), and there it was held that the money which had to be expended by the corporation before the reservoir could be constructed was part of the cost of construction. It is said that the decision in that case compels us to hold that the respondents are entitled to succeed in the present case. But what the respondents desire to add here to the old assessment is neither money which has to be paid as a condition precedent to the construction of the building, nor is it part of the cost of construction itself. It is therefore, in my opinion, not an element to be taken into consideration at all.

Judgment for the appellants.

Solicitors for appellants: *Thompson & Debenhams.*
Solicitors for respondents: *Sworder & Longmore.*

(1) 1 M. & S. 503. (2) [1899] 2 Q. B. 14.

J. F. C.

C. A.
1901
July 5, 12.

[IN THE COURT OF APPEAL.]

In re BAKER.
Ex parte LUPTON.

Bankruptcy—Lease—Disclaimer by Trustee of Bankrupt Assignee—Mortgage by Sub-demise—Option to accept Vesting Order or to be excluded from Interest in Demised Property—Persons entitled to apply for Order—Application by Lessor—Persons to be served with Notice—Discretion of Court—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 55, *sub-s.* 6—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 13.

The lessee of a house assigned it, and the assignee again assigned it to a person who afterwards became bankrupt. Before the bankruptcy the bankrupt had mortgaged the house by sub-demise. The trustee in the bankruptcy disclaimed the lease:—

Held, that the lessor was entitled, without serving any one but the mortgagee, to apply, under s. 55, sub-s. 6, of the Bankruptcy Act, 1883, for an order putting the mortgagee to his election whether he would accept an order vesting the house in him, subject to the liabilities in respect of it to which at the date of the filing of the bankruptcy petition the bankrupt was subject under the lease, or be excluded from all interest in and security upon the property.

In such a case the Court has a discretion as to the persons who are to be served with notice of the application.

But, if the lessee is not served, he is not prejudiced by the order, and it does not prevent him from afterwards applying for an order to vest the property in himself in case the underlessee does not accept a vesting order.

In re Cock, (1887) 20 Q. B. D. 343, *In re Finley*, (1888) 21 Q. B. D. 475, and *In re Morgan*, (1889) 22 Q. B. D. 592, discussed and followed.

Appeal against an order made by one of the registrars in bankruptcy, under s. 55, sub-s. 6, of the Bankruptcy Act, 1883, excluding mortgagees of a leasehold house, 2, Rupert Street, Leicester Square, by sub-demise from a bankrupt, from all interest in and security upon the property, unless they would within a specified time accept and apply for an order vesting the property in them subject to the same liabilities as the bankrupt was subject to under the original lease at the date of the filing of the bankruptcy petition.

On November 23, 1889, Mrs. Schlösser (then Miss Jacobs)

demised the house to Vincenzo Columbati for a term of twenty-one years from March 25, 1889, at the yearly rent of 100*l.*, and subject to the lessee's covenants contained in the lease.

On February 10, 1890, Columbati died intestate, and on October 16, 1890, his widow, who was his administratrix, in consideration of 200*l.*, assigned the house for the residue then unexpired of the term, at the rent reserved by the lease and subject to the lessee's covenants therein contained, and also the goodwill of the business which Columbati had carried on, to Fernando Cima.

On January 19, 1892, Cima assigned the house and the goodwill in the same way to Richard Baker.

On February 22, 1899, Baker sub-demised the house by way of mortgage for the residue then unexpired of the term of twenty-one years, except the last day thereof, to Isabella Lewis, widow.

Baker afterwards made a second mortgage of the house by sub-demise to Messrs. J. & W. Nicholson & Co., subject to the mortgage to Mrs. Lewis.

On January 4, 1900, Mrs. Lewis died, having by her will appointed Hugh Lupton, Allan Field, and J. C. Ley her executors.

In February, 1901, Baker was adjudicated a bankrupt.

On May 13, 1901, the trustee in the bankruptcy executed a disclaimer of the lease.

On June 18, 1901, the registrar, on the application of the lessor, made an order that "unless Messrs. Nicholson do within fourteen days from this day elect to accept and apply for an order vesting in them the premises, 2, Rupert Street (which have been disclaimed by the trustee), and making them subject to the same liabilities as the bankrupt was subject to under the lease in respect of the premises at the date of the filing of the petition, they shall be excluded from all interest in and security upon the said premises; and further that, if Messrs. Nicholson shall not elect to accept such order as aforesaid within the said period of fourteen days, then, unless the trustees and executors of Isabella Lewis, deceased, do within seven days from the expiration of the said period of fourteen days

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BAKER, *In re.* LUPTON, *Ex parte.*

elect to accept and apply for an order vesting in them the said premises, and making them subject to the same liabilities as the bankrupt was subject to under the lease in respect of the premises at the date of the filing of the petition, they shall be excluded from all interest in and security upon the said premises."

The executors of Mrs. Lewis appealed, and the operation of the order was stayed pending their appeal.

Cooper Willis, K.C., and *Muir Mackenzie*, for the executors. It is submitted that sub-s. 6 of s. 55 of the Bankruptcy Act, 1883, does not apply to the present case. Mrs. Lewis and her executors have neither privity of contract nor privity of estate with the original lessor of the house. Such an order has never yet been made under sub-s. 6 when, as here (so far as appears), two solvent persons—the administratrix of Columbati, the original lessee, and Cima, the first assignee of the lease—are interposed between the lessor and the underlessee. Sect. 55 (1)

By s. 55, "(1.) Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him, at any time within three months after the first appointment of a trustee, disclaim the property.

"Provided, that where any such property shall not have come to the knowledge of the trustee within one month after such appointment, he may disclaim such property at any time within two months after he first became aware thereof.

"(2.) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person."

"(6.) The Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery

of the Bankruptcy Act, 1883, is a modification of s. 23 of the Bankruptcy Act, 1869. Under that Act it was held in *Hill* v. *East and West India Dock Co.* (1) that, when the trustee in the bankruptcy of the assignee of a lease had disclaimed the bankrupt's interest in the demised property, the original lessee remained liable upon his covenant to pay the rent, notwithstanding that by s. 23 on the execution of the disclaimer the lease should be deemed to have been surrendered on the date of the order of adjudication. It was held that the meaning was, that the supposed surrender was to operate only as between the lessor and the bankrupt's trustee and estate, and that it did not affect the rights and liabilities of other persons. In

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thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose.

"Provided always, that where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as underlessee or as mortgagee by demise, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or underlessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there shall be no person claiming under the bankrupt who is willing to accept an order upon such terms, the Court shall have power to vest the bankrupt's estate and interest in the property in any person liable either personally or in a representative character, and either alone or jointly with the bankrupt, to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt."

By s. 13 of the Bankruptcy Act, 1890, "The period of twelve months shall be substituted for each of the periods of three months and two months limited by sub-s. 1 of s. 55 of the principal Act, and such period of twelve months may be extended by the Court.

"The Court may, if it thinks fit, modify the terms prescribed by the proviso in sub-s. 6 of the same section so as to make the person in whose favour the vesting order may be made subject only to the same liabilities and obligations as if the lease had been assigned to him at the date when the bankruptcy petition was filed, and (if the case so requires) as if the lease had comprised only the property comprised in the vesting order."

(1) (1884) 9 App. Cas. 448.

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that case Lord Bramwell (who differed from the other learned Lords) in a note to his judgment expressed an opinion (1) that the proviso to sub-s. 6 of s. 55 of the Bankruptcy Act, 1883, "would not apply to a lessee when the assignee of the lease had become bankrupt." The Act of 1883 did not apply to the case then before the House of Lords. Lord Bramwell added, "Why should a sub-lessee or mortgagee bear the loss occasioned by a lessee's bankruptcy? Why not the landlord?" It is submitted that under the circumstances of the present case the lessor is not a person who has an interest in the demised property. In *In re Cock* (2) an order excluding the mortgagee by sub-demise from a lessee who had afterwards become bankrupt from all interest in the property was made upon the application of the original lessor. But in that case the lease had not been assigned as in the present case. Columbati's administratrix was not served with notice of the application, and she could not be excluded from the right to take a vesting order. The trustee in the bankruptcy could not have surrendered the lease while the sub-lease lasted. It is submitted that sub-s. 6 applies only where there is a lease and a sub-lease and the lessee becomes bankrupt; it does not apply where between the lessor and the bankrupt there is interposed a solvent person who is liable on the lessee's covenants in the original lease. Notwithstanding the registrar's order, the lessor could still sue Columbati's administratrix for rent. In *In re Finley* (3) the decision in *In re Cock* (2) was approved; but in that case too the bankrupt was the original lessee, and he had mortgaged the property by sub-demise. No one was interposed between the original lessor and the bankrupt. It is submitted that the original lessor is not entitled to apply under sub-s. 6 for an order vesting the property in a sub-lessee, or excluding him if he will not accept a vesting order, unless he (the lessor) could by means of the order or otherwise get back the property himself. In the present case, if the mortgagee's executors are excluded, Cima or Columbati's administratrix might claim the property. The order would not determine the lease. The

(1) 9 App. Cas. at p. 463. (2) 20 Q. B. D. 343.
(3) 21 Q. B. D. 475.

effect of the order would be to impose on the mortgagee's executors all the liabilities incurred by the bankrupt in respect of the property since the assignment to him, i.e., during a period of nine years. Sect. 13, sub-s. 2, of the Bankruptcy Act, 1890, was intended to prevent that result. It is submitted that a lessor cannot apply for a vesting order as against a sub-lessee unless, if he should decline to accept it, the lessor could himself apply for a vesting order. This the lessor could not do in the present case, for, notwithstanding the disclaimer by the trustee, the lease continues to exist, and the lessor's rights under it remain: *O'Farrell* v. *Stephenson* (1); *Smalley* v. *Hardinge*. (2) So long as the lease and the liability of the lessee under it are subsisting, the lessor cannot herself apply for a vesting order; and if so, she cannot apply for such an order as this against the underlessee. The order compels the executors to accept a vesting order on the same terms as those on which the bankrupt held the property at the date of the adjudication or to lose a valuable security. They would have, therefore, to indemnify Cima as well as to become subject to those liabilities to the lessor which arose out of privity of estate. Why should the lessor be entitled to ask that a sub-lessee should be placed in a position different from that for which he contracted, when the lessor's position is in no way altered? Sect. 13 of the Bankruptcy Act, 1890, applies only in very exceptional cases: *In re Walker* (3); *In re Britton*. (4) Sect. 55 contemplated only a case in which the lessor had no one whom he could sue. Mortgages of leasehold property are made by underlease in order that the mortgagee may avoid a personal liability to the lessor. The executors desire only to be left as they are. The reasonable construction of s. 55 is that it meant that some one should be liable to the lessor, or that he should get his property back. As a general rule, if a lessor is within the provisions of s. 55, sub-s. 6, the Court, after giving leave to disclaim, ought to make a vesting order on the application. The lessor is entitled to apply for a vesting order only when there is no one liable to him upon the lessee's covenants; he is not entitled to

(1) (1879) 4 L. R. Ir. 715.
(2) (1881) 7 Q. B. D. 524.
(3) (1895) 2 Manson, 60.
(4) (1889) 6 Mor. 130.

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apply when, as here, the original lessee and his assignee remain liable.

Wace, for the lessor. This case falls literally within the words of sub-s. 6 of s. 55. The application for a vesting order may be made by any member of either of the two classes mentioned in sub-s. 6, namely, (1.) any person claiming any interest in the disclaimed property; (2.) any person under any liability not discharged by the Act in respect of the disclaimed property. If the lessor cannot apply for an order against the underlessee, because the lessee is still liable to him under the original lease, it would equally follow that the lessee could not apply because his assignee is liable to him upon his covenants. But the words of sub-s. 6 include the original lessor; he is a person interested in the disclaimed property: *In re Finley*. (1) The Court has a discretion to direct which of the persons entitled to apply for an order under sub-s. 6 shall be served with notice of the application: *In re Morgan*. (2) The lessor ought not to be compelled to wait till it is seen whether Columbati's administratrix will apply for a vesting order. The proviso to sub-s. 6 is distinctly in favour of the lessor, and is a great modification of s. 23 of the Bankruptcy Act, 1869. Under that Act the Court had no power to make a vesting order; it could only order delivery of possession: *Ex parte Walton*. (3) The power to make a vesting order was given for the benefit of the original lessor. But the power to vest the property in the lessor arises only if no one claiming under the bankrupt is willing to accept a vesting order. If the observations of Cave J. in *In re Cock* (4) are to be taken in the sense which has been attributed to them, they are inconsistent with the view expressed by the Court of Appeal in *In re Morgan*. (2) But that is not their true meaning. The order does not in any way prejudice the rights of Columbati's administratrix.

Cooper Willis, K.C., in reply. The judgment in *In re Cock* (5) was a considered judgment of the Court, and it must be assumed that every expression in it was carefully weighed. *In re*

(1) 21 Q. B. D. 475.
(2) 22 Q. B. D. 592.
(3) (1881) 17 Ch. D. 746.
(4) 20 Q. B. D. at p. 348.
(5) 20 Q. B. D. 343.

Morgan (1) does not touch the question whether the lessor can make the application without serving the lessee. Sect. 55 may be difficult to construe, but it is framed on the assumption that the person who makes the application is himself entitled to delivery of the property or to a vesting order.

Cur. adv. vult.

July 12. RIGBY L.J. I agree with the judgment of the learned registrar, and in my opinion the appeal should be dismissed.

COLLINS L.J., after stating the facts as above, and reading the order of the registrar, continued:—The effect of this order is simply to put the two mortgagees successively to their election whether they will accept an order vesting the leasehold property in them, subject to the liabilities under which the bankrupt held it, or have their interest in and security upon the property determined. The executors of the first mortgagee have appealed against this order, and they say that, because the original lessee's representative and her assignee intervene between the lessor and the bankrupt, and the lessee's estate (as they suggest, though there is no evidence about it) is solvent, sub-s. 6 of s. 55 does not apply, and that, although the mortgagees might be compelled at the instance of one of those intervening persons to exercise the option which the order has imposed on them, they cannot be compelled to do so at the instance of the original lessor. In my opinion this question has already been decided adversely to the appellants by two cases to which I will presently refer. [The Lord Justice read sub-ss. 1 and 6 of s. 55, and continued:—]

That section has been the subject of discussion and decision. In *In re Cock* (2) it was decided by Cave and A. L. Smith JJ. that the lessor is, within the meaning of sub-s. 6, a person "claiming an interest" in leasehold property which has been disclaimed by the trustee in a bankruptcy, and that he is entitled to put the machinery of sub-s. 6 in motion. Another step a long way in advance was also taken in *In re Cock* (2),

(1) 22 Q. B. D. 592. (2) 20 Q. B. D. 343.

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for it was there held that, although the lessor may not be in a position to ask for an order vesting the property in himself, still he may put the machinery in motion for the purpose of ascertaining whether a sub-lessee is willing to accept an order vesting the property in him subject to the bankrupt's liabilities in respect of it, or, if not, to give up his interest in the property. The head-note of *In re Cock* (1) is as follows:—

"A lessee mortgaged the leasehold property by sub-demise, and was subsequently adjudicated a bankrupt. The trustee obtained leave to disclaim, and thereupon the lessor applied for and obtained an order, under s. 55, sub-s. 6, of the Bankruptcy Act, 1883, that the mortgagee should be excluded from all interest in and security upon the property, unless within seven days he elected to accept an order vesting in him the disclaimed property, subject to the same liabilities and obligations as the bankrupt was subject to under the lease:—

"*Held*, that the order excluding the mortgagee's interest unless he accepted the terms proposed could be made upon the application of the lessor."

So that in *In re Cock* (1) the step which I have mentioned was taken, and no doubt at first sight the decision seems to be a strong one. It is said now that, though that is the position of the lessor, still the decision cannot apply where, as in the present case, there is a lessee who still remains liable to the lessor upon the covenants in the lease, though he has assigned the lease. But when once it is decided that the lessor is a person who is entitled to put the machinery of sub-s. 6 in motion, it seems to me that there is nothing in this point. The lessor still retains an interest in the property notwithstanding the assignment, and the result of the decision is that a person who retains an interest in the property is entitled to put the machinery of sub-s. 6 in motion, even though he may not be able to ask for a vesting order himself. I should mention that *In re Cock* (1) was approved and followed by the Court of Appeal in *In re Finley*. (2) The matter is made still clearer by the decision of this Court in *In re Morgan*. (3) The head-

(1) 20 Q. B. D. 343. (2) 21 Q. B. D. 475.
(3) 22 Q. B. D. 592.

note is as follows: "Upon an application under sub-s. 6 of s. 55 of the Bankruptcy Act, 1883, for a vesting order in relation to leasehold property of a bankrupt, which has been disclaimed by the trustee in the bankruptcy, the Court has a discretion to direct which of the persons entitled to apply for such an order shall be served with notice of the application, and, if, in the opinion of the Court, the applicant has not served all the persons who ought to be served, he may be ordered to pay the costs occasioned by his default. Until the point left undecided in *In re Finley* (1), as to the extent of the liability of a mortgagee by sub-demise from a bankrupt under an order vesting the original lease in him, shall have been decided, it will be proper to serve the lessor with notice of such an application." The facts of that case were in substance identical with those of the present case, except that the application for the order was made by the original lessee, not, as here, by the lessor. But precisely the same objection might have been urged there to the proceeding being taken by the lessee as has been raised here to its being taken by the lessor. It might have been said that the lessee had an assignee of the lease who was bound to indemnify him against his liability under the lease, and who was apparently solvent, and that this obligation to indemnify continued in force. The lessee stood in the same position as he did before the bankruptcy of the second assignee, and had a solvent person who was bound to indemnify him. But the Court held that the lessee was entitled to apply for and to obtain an order similar to that which has been made in the present case, though notice had not been served on the first assignee. In the course of his judgment in that case Bowen L.J. said (2): "Various persons are entitled under the section to apply for an order vesting the property in themselves or in some one else. The application may be made by any person either claiming any interest in the property or under any liability in respect of it which is not discharged by the Act. It is obvious that in the case of a lease there may be many persons who claim to be interested in the property, and many others who, even if they have no interest in it, have come under

(1) 21 Q. B. D. 475. (2) 22 Q. B. D. at p. 596.

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some liability in respect of it. All these persons have a right to compete for a vesting order if they desire it. Primâ facie the Court would not make an order vesting the property in one out of the class who have a right to apply, and who may possibly be injured by an order vesting the property in some one else, without giving the other members of the class an opportunity of being heard. But it is obvious that, in the case of a lease for a long term, if you were to insist on a rigid rule that every member of the class must be served, the expense would be enormous, and in the result it would be barren of any fruit, for the great majority of the class would not care a straw about the matter. Sub-s. 6 of s. 55 says that the Court may make the order 'on hearing such persons as it thinks fit.' The registrar is entitled to deal with the matter broadly, and in a businesslike way, and, if he sees that the interests of any person are likely to be really affected by the order, he may say that that person must be served with notice. If, on the other hand, he thinks that the interest of any person is merely technical, he may deal with the matter in a broader way, and proceed without requiring such a person to be served. The applicant has to submit himself to the discretion of the registrar. If he omits to serve some person who in the interests of justice ought to have an opportunity of being heard on the application, he exposes himself to the risk of having to bear the costs resulting from his improvidence. Up to the time when the matter comes before the registrar the applicant is left free, but then the registrar must exercise his discretion as to the persons who ought to be served." And Bowen L.J. proposed an order in the following terms, which the Court adopted: "A vesting order in the terms of the notice of motion. The applicant to have his costs in the Court below. No costs to be given of the appeal. The order is not to be drawn up for a month. Notice is to be given forthwith by the applicant's solicitors to the lessor and to Evans (the assignee of the lease), or, if he is dead, to his legal personal representative, if there be any. An affidavit of service of the notice, or of the facts which excuse it, is to be lodged with the registrar within fourteen days. Liberty will be reserved to the lessor and to Evans, or his personal

representative, to apply to this Court to rescind or vary the order at any time before this day month." These decisions must govern the present case. The application for the order having been made by a member of one of the classes who are entitled to apply for it, the only question remaining was whether the proper persons had been served with notice. No one ought to be finally excluded from the opportunity of taking a vesting order until the steps suggested by Bowen L.J. have been taken to ascertain whether he had more than a merely technical interest in the property. Here the representative of the original lessee had a somewhat shadowy interest, but her rights are not affected by the order, which merely put the mortgagees to their election whether they would accept the property subject to the bankrupt's liabilities under the lease, or be excluded from all interest in it. If the lessor should desire to obtain an order vesting the property in her, she must take other proceedings for that purpose.

Reliance was placed by the appellants' counsel upon some observations made by Cave J. in the course of his judgment in *In re Cock* (1); but in my opinion those observations do not apply to the matter now in hand. The learned judge said (2): "Let us see how the case will work out in practice. A. grants a lease for ninety-nine years at 100*l.* a year to B., who assigns to C., who in consideration of an advance of 2000*l.* demises to D. for the residue of the term, except three days, at a peppercorn. C. becomes bankrupt, and his trustee, wishing to disclaim, brings A., B., and D. before the Court. A. cannot apply for a vesting order because he is not entitled to the property. Nor can B. so long as D. is willing to take a vesting order. B. therefore applies that D. may be put to his election, and if he declines to take a vesting order that he may be excluded, and a vesting order made in favour of him, B. The same thing occurs where C. is the lessee and B. is only a surety for him. Where there is no person liable, either jointly with the bankrupt or alone, to perform the lessee's covenants, we are of opinion that, notwithstanding the doubt expressed in *Ex parte*

(1) 20 Q. B. D. 343. (2) 20 Q. B. D. at p. 348.

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BAKER, *In re.* LUPTON, *Ex parte.*

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Turquand (1), the landlord may apply that the sub-lessee may be put to his election." Pausing there, all that the learned judge said was that A. was not entitled to apply for a vesting order, because other persons were entitled to do so before him. The learned judge was dealing only with the question of the right to obtain a vesting order, not with the question who was entitled to put the machinery of sub-s. 6 in motion. When once you have the right person making the application, there remains only the question who are the right persons to be served with notice of it. In my opinion the learned registrar's decision was right, and the appeal must be dismissed with costs.

ROMER L.J. I agree. It is clear from the words of s. 55, and from the authorities to which my brother Collins has referred, that the lessor is a person who is entitled to make this application. He is a person "claiming an interest in the disclaimed property" notwithstanding the liability of the original lessee upon the covenants in the lease which may be worthless. On this application it is clear that the persons entitled to a vesting order, if they chose to accept it, were the mortgagees by sub-demise, and the registrar has rightly given them the option of taking a vesting order, if they will accept it within a reasonable time. And in my opinion the registrar was not bound at once to go on and make a further order vesting the property in any one else in the event of the mortgagees declining to accept a vesting order. There would be obvious inconveniences in making such a further order then, and the Court is not bound to make it. The practice of making such an order as has been made here is well settled, and it is justified by the authorities which have been referred to. It is a matter within the discretion of the registrar whether he will require the lessee or any one else to be served with notice of the application. The mortgagee is in no way prejudiced by the absence of the lessee, with whose rights and liabilities he is not concerned. Nor is the lessee prejudiced, because he is not present when the order is made. If it should turn out that

(1) (1884) 14 Q. B. D. 405.

he is solvent, and he is sued by the lessor on his covenants, I can see no reason why he should not apply for and obtain an order vesting the property in him. So much for the technical objections to the order. On the substance of the case it seems to me that there is still less to be said for the mortgagees. They claim only through an assignee of the lease, and they have only such rights as that assignee had. It would be absurd to suppose that they could hold the property without paying the rent and performing the lessee's covenants. Nor can I see that the mortgagees have a right to claim further delay, and to wait until the lessor re-enters for breach of covenant, or proceeds against the lessee upon the covenants in the lease. In my opinion the appeal fails both in form and in substance, and it should be dismissed with costs.

Cooper Willis, K.C., asked for leave to appeal to the House of Lords.

THE COURT refused to give leave.

Appeal dismissed.

Solicitors: *Nash, Field & Co.; Boyce & Son.*

W. L. C.

C. A.
1901
June 7, 27.

[IN THE COURT OF APPEAL.]

In re E. W. A., a Debtor.

Accord and Satisfaction—Judgment Debt—Joint and Several Debt—Release to one Co-debtor—Extinguishment of Debt—Construction of Release—Intention—Surrounding Circumstances.

A. and B. became liable on a "joint and several" guarantee to a bank for a sum of 6000*l.* owing to the bank from a company. Subsequently the bank obtained judgment for that sum against A. and B. "jointly and severally." The judgment not being satisfied, the bank presented a bankruptcy petition against B. alone for the whole judgment debt, but the petition was withdrawn upon terms arranged between B. and the bank and embodied in a receipt given to B. by the bank for 3000*l.* partly in cash and partly in bills paid and given by B. "in full discharge of all claims by the bank against B. in connection with the company and all guarantees given by him to the bank in connection with that company, and in settlement of any outstanding questions as to the amount due to the bank." The bank then presented a bankruptcy petition against A. alone for 3000*l.*, the alleged "balance" of the judgment debt of 6000*l.*:—

Held, by Rigby and Collins L.JJ. (Romer L.J. doubting), that the receipt amounted to an accord and satisfaction equivalent to a release of B. from the entire joint and several judgment debt, there being no surrounding circumstances qualifying its effect as an absolute release in terms, and consequently that by reason of the release of A.'s co-debtor there was no debt to support bankruptcy proceedings against A.

Ex parte Good, In re Armitage, (1877) 5 Ch. D. 46, distinguished.

The rule of law that the release of one of two joint debtors under a joint and several obligation operates as a release of the other applies as much to a judgment debt as to any other obligation.

By a memorandum dated September 27, 1899, addressed to the Capital and Counties Bank, Limited, and signed by four persons, including the debtor and one B., in consideration of the bank agreeing to grant to the Professional and Trades Papers, Limited, a loan of 15,000*l.*, for which that company had issued or was about to issue to the bank debentures for that amount as security, the four signatories guaranteed to the bank the payment of all moneys which should at any time become due from the company to the bank both in respect of the said loan and on the general balance of their account with

the bank; and the guarantors agreed that that guarantee should be a continuing guarantee to the extent at any one time or times thereafter of any sum or sums of money for the time being due upon such general balance as aforesaid; and they declared that the bank might grant time or other indulgence to or compound with the company or any person or persons liable on any bill or other security or guarantee held by the bank without affecting the present guarantee; and the memorandum contained a proviso and stipulation that the guarantors should be respectively liable on the guarantee only to the extent of the sums set opposite their respective names in the schedule thereto. In the schedule, B. and the debtor were bracketed together as liable "jointly and severally" for "6000*l.*"

On October 1, 1900, the Capital and Counties Bank obtained judgment, under Order XIV., against the four guarantors for the amounts set opposite their respective names in the schedule to the guarantee, together with interest and costs, the judgment, as against the defendants B. and the debtor, being "jointly and severally" for the sum of 6000*l.*

It appeared that B. was a person of means and position, whereas the debtor was a young journalist of little or no independent means. The judgment as against B. and the debtor being unsatisfied, the bank presented a bankruptcy petition against B. alone for the judgment debt of 6000*l.*, whereupon the solicitors for the bank and B. met on March 7, 1901, and arranged terms upon which the petition might be withdrawn, and on the same day those terms were embodied in a document in the form of a receipt (and bearing a receipt stamp) signed by the bank's solicitors and handed by them to B.'s solicitors.

The document was as follows:—

"7 March, 1901.

"Dear Sirs,—

"*Capital and Counties Bank* v. *B*——.

"We beg to acknowledge the receipt of the sum of two thousand five hundred pounds and five bills for 100*l.* each dated to-day, payable at 2, 4, 6, 8, and 10 months respectively in full discharge of all claims by the Capital and Counties

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Bank, Limited, against Mr. B—— in connection with the Professional and Trades Papers, Limited, and all guarantees given by him to the bank in connection with that company, and in settlement of any outstanding questions as to the amount due to the bank, and we undertake to attend on the hearing of the bankruptcy petition to consent to the same being withdrawn or dismissed on terms that Mr. B—— pays the costs."

Pursuant to that arrangement the petition against B. was withdrawn or dismissed.

On March 18, 1901, the bank served the present debtor with a bankruptcy notice requiring payment of the sum of "3037*l.*, being, as to 3000*l.*, the balance of the amount due on a final judgment" obtained by the bank against the debtor and B. "jointly and severally" for the sum of 6000*l.*, and as to 37*l.*, interest on the judgment debt.

The notice not being complied with, the bank, on March 26, 1901, presented a bankruptcy petition against the debtor, and on April 13 a receiving order was made against him, but on the 15th, upon his application, the registrar made an order staying the advertisement and other proceedings under the receiving order to enable the debtor to appeal.

The debtor accordingly appealed against the receiving order. The appeal was heard on June 7 and 28.

The question was whether the document or receipt given by the bank to B. on March 7, 1901, operated as a complete discharge from the "joint and several" judgment debt of 6000*l.*

Herbert Reed, K.C., and *A. E. Sims*, for the debtor. There is no debt upon which the bankruptcy petition can be supported. There is nothing in the guarantee, or in anything which has since taken place, to affect the ordinary rule of law that payment by one of several joint debtors, and his discharge by the creditor, or an accord and satisfaction with him, discharges the other joint debtors. That which was done in the present case was in the nature of an accord and satisfaction. The payment was expressly stated to be "in full discharge of all claims" by the bank in connection with the company.

The rule of law is clearly stated in *Nicholson* v. *Revill* (1) and *Cheetham* v. *Ward*. (2)

Hansell, for the bank, the petitioning creditors. The common law doctrine as to the release of joint debtors has no application after judgment has been recovered against them, because the debt is then absolutely fixed: *Kendall* v. *Hamilton*. (3)

In *Drake* v. *Mitchell* (4) it was held that, a bill being given by one of three joint covenantors for part of a debt secured by the covenant, a judgment recovered on the bill was no bar to an action of covenant against the three, it not being averred that the bill had been accepted as satisfaction of the debt, nor that it had produced satisfaction in fact, though it was stated to have been given for the payment and in satisfaction of the debt. Though the taking by a creditor of a bill of exchange from his debtor suspends the creditor's remedies during the currency of the bill, an act of bankruptcy committed by the debtor before maturity of the bill remits the creditor to his original right: *In re Raatz*. (5) In *Kearsley* v. *Cole* (6) it was held that, a debtor having executed a composition deed to which a banking company, who had advanced money to the debtor, and a surety for him were parties, the deed containing a reservation of remedies against sureties, the surety, who had paid the debt to the bank, was entitled to recover the amount from the debtor. In *Bateson* v. *Gosling* (7) a deed of arrangement under the Bankruptcy Acts, 1861 and 1869, contained a release of the debtor, subject to a proviso reserving the rights of creditors for the payment of whose debts there were sureties for the debtor: it was held that this operated as a covenant not to sue, and that it did not extinguish the debt so as to bar the remedy against the surety.

The document in the present case is not, upon its true construction, an accord and satisfaction of the entire debt. It was

(1) (1836) 4 A. & E. 675; 43 R. R. 460.

(2) (1797) 1 B. & P. 630; 4 R. R. 741.

(3) (1879) 4 App. Cas. 504, 515–6.

(4) (1803) 3 East, 251; 7 R. R. 449.

(5) (1897) 4 Manson, 127.

(6) (1846) 16 M. & W. 128, 135.

(7) (1871) L. R. 7 C. P. 9.

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to carry out an arrangement between B. and the bank alone, and what B. desired to do was to compromise the bankruptcy petition that had been presented against himself. This is not a formal release under seal, but a mere agreement between the creditors and one of the debtors: its intention was, not to release the debt, but to relieve B. personally from proceedings by his paying what was in equity, as between B. and his co-surety, his share of the debt, namely, one-half. It is the intention that must be considered: *Ex parte Good, In re Armitage* (1); *Re Wolmershausen.* (2)

Again, although the debt has passed into a judgment, it was a debt which arose between two persons as co-sureties; and even assuming the document does operate as a release, it only operates upon the liability of one co-surety in respect of his one-half of the debt, leaving the liability of the other co-surety in respect of his half untouched.

[ROMER L.J. But the co-suretyship is merged and gone by the judgment. The debt is fixed by the judgment.]

But the Court may go behind the judgment and see what was the foundation of it; and the foundation here was co-suretyship.

It is submitted then, upon the construction of this document, that it was not the intention of the bank to release the debt altogether, but only to release the personal liability of B., who was doing his duty in paying the bank the share he was liable to pay.

Herbert Reed, K.C., in reply. There is no evidence on the part of the bank, the petitioning creditors, of any reservation of rights at the time the receipt was given; and, considering the present debtor's position—a young journalist of no means and therefore not a very responsible debtor—it is scarcely probable that the bank intended to reserve any claim against him. The real question is, What is the true construction of this document as it stands: what does it mean? *Ex parte Good, In re Armitage* (1), and *Re Wolmershausen* (2) have no real application to this case, for the circumstances were entirely

(1) 5 Ch. D. 46. (2) (1890) 62 L. T. (N.S.) 541; 38 W. R. 537.

different. This is an absolute discharge to B. "of all claims"; and the debtor relies upon the well-settled and long-established rule of law, that when a creditor releases one of two or more sureties who have contracted jointly and severally, the others are discharged: *Hammon* v. *Roll* (1); *Ward* v. *National Bank of New Zealand* (2); *Bonser* v. *Cox* (3); *Mercantile Bank of Sydney* v. *Taylor* (4); *Wallace* v. *Kelsall.* (5)

[ROMER L.J. But you must look into the whole equity: *Steeds* v. *Steeds.* (6)]

In construing a release it is not permissible to speculate in favour of one party as to what may have been the intention.

[ROMER L.J. It seems to me that this document does not purport to be a discharge of the "debt," or of any particular debt, for the judgment debt is not referred to, but of a claim against the particular person named, B. In equity it would seem to mean, "We will no longer proceed against *you.*"]

The words are as wide as possible—"all claims," which include the entire judgment debt; and where the release is absolute, you cannot treat it as a covenant not to sue, unless that intention appears: *Commercial Bank of Tasmania* v. *Jones.* (7)

RIGBY L.J. I agree with the judgment about to be pronounced by Collins L.J., and think it unnecessary to say anything more.

COLLINS L.J. The debt upon which the petition was founded in this case is a debt on a joint and several judgment which was given in respect of the joint and several liability of the debtor under a guarantee; and the ground of the appeal is that the liability of the debtor has been released by reason of the fact that a release has been given to his joint debtor. The release is in these terms: [The Lord Justice then read the document of March 7, 1901, and proceeded:—]

After that arrangement was made with B., these proceedings

(1) (1642) Mar. 202.
(2) (1883) 8 App. Cas. 755, 764.
(3) (1841) 4 Beav. 379.
(4) [1893] A. C. 317.
(5) (1840) 7 M. & W. 264.
(6) (1889) 22 Q. B. D. 537.
(7) [1893] A. C. 313, 316.

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in bankruptcy were commenced against the present debtor, and his answer to them is that this document, when properly considered, amounts to an accord and satisfaction which is equivalent to a release of the joint debt which was the foundation of the judgment, and is, therefore, a satisfaction of his liability under the judgment. The question really turns on this, whether or not this document has the effect of accord and satisfaction in getting rid of the joint and several liability of B. under the judgment. If it has that effect, it is not disputed that the rule of law applies, namely, that the release of one of two joint debtors has the effect of releasing the other.

Mr. Hansell takes two points. In the first place he says that the foundation of this obligation is the judgment, and that the doctrine that the release of one of two joint debtors operates as a release of the other has no application to a case such as this, where there has been a judgment against both. I cannot see any foundation in principle for that distinction, for under any judgment or other obligation creating a joint liability there is only one debt, and, that being so, the rule that the release of one of the joint debtors gets rid of the debt applies equally whether the obligation arises on a judgment or on any other security. Therefore no reliance can be placed upon the fact that the obligation in this case was a judgment. It is too late now to question the law—that where the obligation is joint and several, the release of one of two joint debtors has the effect of releasing the other.

Then there was another, though a subsidiary, point made by Mr. Hansell, namely, that these two persons were in fact co-sureties, and that some qualification of the release arises by reason of the original co-suretyship. The point, however, was not pressed, and I need say no more about it, except that there is no foundation for the suggestion.

But now I come to what was really the main point argued before us. It is clear that, although a document in terms purports to release one of two joint debtors, yet it may contain in terms a reservation of rights against the other joint debtor. Where you find those two provisions you construe the document, not as a release, but merely as an undertaking not to

sue a particular individual, and the result is that the right to proceed against the co-debtor is reserved and can be put in force against him. Whenever you can find from the terms of the document an agreement for the reservation of rights against the co-debtor, then, I agree, the document cannot be construed as an accord and satisfaction of the joint debt, and, therefore, as a release of the co-debtor. But it appears to me that, on the face of this document, there is no intention shewn so to limit its effect, and that it is framed in the widest possible terms so as to cover, not only this particular debt, but all other claims by the bank in connection with the Professional and Trades Papers, Limited, for it is admitted that the foundation of the judgment was the guarantee, and at the time this document was drawn up there was this joint liability on the judgment to the extent of 6000*l.* And there is this circumstance to be observed, that this document expressly states that the cash and bills are accepted "in full discharge of all claims by the Capital and Counties Bank, Limited, against Mr. B—— in connection with the Professional and Trades Papers, Limited." Now, having regard to the fact that the fundamental claim against B. was the judgment for 6000*l.*, it is impossible to say that this judgment is not one of the "claims" within the words I have read.

Accordingly, I am of opinion that the liability on the judgment is clearly embraced in the claims discharged by the acceptance of this receipt. Why, then, should any limitation be placed upon the effect of this discharge of "all claims"? If there is no such limitation, the effect of the document is that it releases the claim against both co-debtors. If this legal consequence had been pointed out to the bank at the time, they might have said that that was not what they intended, but that is a factor common probably to all cases in which a release is given to one of two joint debtors. The person giving it may not realize the full legal consequences of it as regards the release of the co-debtor; but that is not, in my opinion, a sufficient ground for reading into the document something that is not expressed in it; and unless you find in it something qualifying the general words, it appears to me that the legal

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consequences of the general words of discharge must follow, notwithstanding that those consequences may go beyond what the person giving the document would have intended if they had been pointed out to him at the time, and he had had an opportunity of addressing his mind to them.

But then it is said that there are surrounding circumstances in this case which ought to induce us to qualify the primâ facie meaning of the document. What are the alleged surrounding circumstances? We have no evidence of any beyond the fact that a guarantee was given by the present debtor and B. to the bank, and that the debtor was a young man engaged in literary work, while B. appears to have been a man of some means. But beyond that we can only speculate. There are no other materials from which we can draw any inference, and there does not appear to me to be any specific ground upon which we can narrow down this document to a release of the separate claim against B. There is no primâ facie presumption, as there was in the cases to which I will refer presently, that the parties were dealing with the liability of the one co-debtor and not with the liability of the two. The fact is that there was an agreement by the bank to take a specific sum, and that B. paid or agreed to pay that sum, which happened to be half the entire debt; but you cannot infer from that that there was some good reason for taking half from the one, while reserving the right to get the remaining half from the other. If it had been pointed out to B. at the time that it was intended by the bank to reserve their rights against the other debtor, he might have refused to pay the money and give the bills. It appears to me that there is nothing in the surrounding circumstances of this case, or in the fact of one-half of the entire sum being accepted from one debtor, to lead to the inference that the persons contracting here intended to limit the release to one only of the debtors.

Two cases have been referred to as supporting the contention that this document operated only as a release of a separate liability. One is *Ex parte Good, In re Armitage* (1), and the other is *Re Wolmershausen* (2); but when the facts of those

(1) 5 Ch. D. 46.

(2) 62 L. T. (N.S.) 541; 38 W. R. 537.

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cases are considered, they afford no ground for cutting down or altering the primâ facie meaning of the document before us.

In *Ex parte Good* (1) the facts were these. One Smythies was liable under a guarantee which he had given to a bank as security up to a certain amount for the drawing account of John Armitage & Co. A liquidation petition was filed in the name of the firm by Armitage, a member of it, and a resolution was passed to liquidate by arrangement. The bank tendered a proof for a sum they claimed to be due to them from the firm, and also issued a writ against Smythies to recover a sum which was much beyond the amount of his guarantee. The question then arose whether Smythies was in fact a partner in John Armitage & Co.; and it was proved that he had represented himself as partner. The bank had taken their proceedings on the footing of his being a partner, and Smythies intervened by a suit in equity to prevent the bank from treating him as a partner and as such liable for the sum claimed. Thereupon a compromise was come to, and a receipt was given to Smythies by the bank containing general words capable of being construed as releasing the debtor who was jointly liable with him; but the joint debtor was Armitage, and Armitage was then a bankrupt, and, being a bankrupt, his estate, and not himself personally, alone remained liable. The state of things at the time the compromise was come to was this: Smythies asserted that he was not liable as a partner with Armitage, while the bank maintained that he was. That was the controversy at that time between Smythies and the bank, and that was the contest upon which the compromise was arrived at. Those being the facts which the parties to the compromise intended to deal with, the Master of the Rolls, Sir G. Jessel, came to the conclusion (and so should I have done) that the receipt was intended to have reference only to the bank's claim against Smythies, leaving their claim against Armitage's estate untouched. There was no joint liability which could de facto exist, at the time of the compromise, as between Armitage and Smythies, for the liability of Armitage himself had then

(1) 5 Ch. D. 46.

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ceased; and therefore the compromise could only deal with the rights of the bank as against Smythies himself. Accordingly it was held that, looking at the surrounding circumstances, the receipt was not intended to extend to anything outside its scope, or to release Armitage's estate, which was under a separate liability. In that case, therefore, there was every ground in the surrounding circumstances for holding that the release was limited and did not extend to anything outside its scope, or to releasing the liability of Armitage's estate. That is quite sufficient to shew that that case does not warrant us in saying that this document, which depends upon its terms alone, there being no surrounding circumstances as in *Ex parte Good* (1) to qualify them, should be construed in any other sense than according to its literal meaning.

Then I come to the case before Stirling J., *Re Wolmershausen* (2), which was to the same effect, and was a decision substantially on the same grounds, though they were more clear than in the other case. It is, therefore, no authority for importing into this document any intention on the part of the bank to reserve their rights against the co-debtor A. Accordingly, having regard to the principle that the release of one of two joint debtors is the release of the other, we cannot, without straining the rules of evidence and the law, assent to Mr. Hansell's contention; and therefore, as this petition was based on the ground that the debtor was still liable under the judgment, we must hold that this liability has been discharged by this document by which B. was relieved, by way of accord and satisfaction, from his liability. The appeal must, therefore, be allowed.

Romer L.J. As my brethren are agreed on this case, I will content myself with an expression of doubt. But for their opinion, I should have considered the document of March 7, 1901, having regard to the particular form of it and to the surrounding circumstances, not as amounting to a discharge of the debt itself, but only as a discharge of the particular debtor

(1) 5 Ch. D. 46. (2) 62 L. T. (N.S.) 541; 38 W. R. 537.

from the liability as against himself personally: in other words, as an agreement by the bank not to sue him.

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Appeal allowed.

Solicitors: *Steadman & Van Praagh; Cameron, Kemm & Co.*

G. I. F. C.

[IN THE COURT OF APPEAL.]

C. A. 1901 *July* 2.

TURNER *v.* SAWDON & CO.

Master and Servant—Agreement to engage and employ Servant—Refusal to provide Servant with Work—Breach of Contract.

The defendants agreed to engage and employ the plaintiff as their representative salesman for a period of four years. Before the expiration of that time the defendants, though willing to continue to pay wages to the plaintiff, refused to give him any work to do as their representative salesman. In an action to recover damages for breach of contract:—

Held, that there was no obligation on the defendants to provide the plaintiff with work.

Doubted and distinguished Clerk and Bromage [1918] 1 K.B. 315

APPLICATION by the defendants for judgment or for a new trial in an action tried by Kennedy J. with a jury.

The defendants carried on business as cotton-warp agents at Bradford, Yorkshire, and in March, 1898, an agreement was entered into by them with the plaintiff, who was in their employment, which contained the following clauses: "(1.) The said G. E. Sawdon & Co. agree to continue to engage and employ the said Ernest Turner as their servant and representative salesman from the 1st day of March, 1898, for a period of four years ending February 28, 1902 . . . . (2.) The said G. E. Sawdon & Co. further agree to remunerate the said Ernest Turner for his services by a payment to him of a salary of 200*l.* per annum, to be paid in monthly instalments, for the space of two years, and 250*l.* per annum for the remaining two years . . . . (3.) The said Ernest Turner agrees to devote the whole of his time to the business of the said G. E. Sawdon & Co., to faithfully serve them as heretofore in soliciting orders

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and generally in aiding to conduct the business, and not to divulge to any competitor or other person any of the business secrets of the said G. E. Sawdon & Co. whilst in their service, and to carefully obey their directions from time to time, and will keep, protect, and promote the success of the said business as far as he can . . . ."

The plaintiff acted as salesman for some time; but on December 31, 1900, a letter was handed to him by the defendants, which was as follows: "We have decided that you shall take a month's holiday—that is to say, that although you will still be in the employ of the firm and at their disposal, you will not after to-day be required to perform any duties. You will please call for your salary on January 31, when any further instruction will be given you." The plaintiff came to the office of the firm on the following day, but was requested to leave. Immediately afterwards circulars were issued by the defendants to their customers stating that the plaintiff had no authority to transact any business on their behalf. The plaintiff then commenced business on his own account, and brought this action against the defendants for damages for breach of the agreement of March, 1898, on the ground that the defendants "after the 31st December, 1900, have neglected and refused, and still neglect and refuse, to continue to engage and employ the plaintiff as their servant and representative salesman, in accordance with the terms of the said agreement."

The learned judge left the following questions to the jury:—

(1.) Was the plaintiff ready and willing to perform the agreement according to its terms? Answer, Yes.

(2.) Did the defendants' conduct on December 31, 1900, and January 1, 2, 3, and 4, 1901, constitute a breach of their obligations under their contract towards the plaintiff? Answer, Yes.

(3.) Was it such a substantial breach as to justify the plaintiff in treating it as a refusal on the part of the defendants to perform and abide by the contract? Answer, Yes.

(4.) If the above questions are answered in the affirmative, what damages is the plaintiff entitled to? Answer, 125*l*.

On further consideration, the learned judge gave judgment

for the plaintiff for the amount of the damages found by the jury.

The defendants appealed.

Tindal Atkinson, K.C., and *Walter Beverley*, for the defendants. At the trial the question in the action resolved itself into this—whether the defendants were bound to supply the plaintiff with work during the currency of the agreement. It was not denied that they were willing to pay the plaintiff his wages, but it was said that their obligation extended beyond that, and that if they had an opportunity, as no doubt they had, of putting the plaintiff in the way of doing work for them they were bound to do this. The words of the agreement do not raise any such obligation. In *Emmens* v. *Elderton* (1) Crompton J. pointed out that the meaning of the word "employ" with relation to a servant was "hire" or "keep in a service," and that it does not necessarily imply that the master is bound to supply the servant with any particular work while the relationship exists. The opinions of the majority of the judges in the House of Lords and of the judges in the Exchequer Chamber (2) agree with this view.

Scott Fox, K.C., and *W. J. Waugh*, for the plaintiff. The words "to employ" in relation to a servant are capable of two meanings—"to retain" or "to give work." In view of the ambiguity, it was for the jury to say in which sense the words were used: *Smith* v. *Thompson*. (3) There are many cases in which the amount of wages is a secondary consideration, and some other matter, such as a desire to appear before the public as an actor, is that which influences the servant in entering into the contract. In this case it was necessary for the plaintiff to keep in touch with the markets in order to preserve his efficiency, and the agreement was to employ him in the capacity of salesman. The duty of employers, as pointed out by Kekewich J. in *Whitwood Chemical Co.* v. *Hardman* (4), is not confined to paying wages; and when

(1) (1853) 13 C. B. 495; 4 H. L. 624.
(2) *Elderton* v. *Emmens*, (1848) 6 C. B. 160.
(3) (1849) 8 C. B. 44.
(4) [1891] 2 Ch. 416, at p. 419.

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the defendants refused to carry out their part of the agreement, the plaintiff was entitled to treat that as a repudiation of the agreement and to sue for breach of contract. The damages in that case would not be measured by the loss of wages, but would, as in a case of wrongful dismissal, be the amount that the plaintiff has lost by the breach of contract.

[They cited *Bunning* v. *Lyric Theatre, Limited.* (1)]

A. L. SMITH M.R. This is an action tried before my brother Kennedy with a special jury. The matter has given rise to some complication, chiefly, as it appears to me, because the learned judge left the construction of an agreement to the jury. There was no term of art and no question of custom the meaning or the existence of which might properly be left to the jury. It was for the judge at the trial to construe the written agreement, and we have now to say what construction should be put upon it. I do not say that the meaning of the document is clear, but I have arrived at the conclusion that the result of the trial was not right. The action is by a man who was in the employment of the defendants, and it was not brought for wages, because it is clear that the defendants were always ready and willing to pay all that was due under the contract. The real question which the plaintiff thought to raise, and which was raised, was whether beyond the question of remuneration there was a further obligation on the masters that, during the period over which the contract was to extend, they should find continuous, or at least some, employment for the plaintiff. In my opinion such an action is unique—that is an action in which it is shewn that the master is willing to pay the wages of his servant, but is sued for damages because the servant is not given employment. In *Turner* v. *Goldsmith* (2) the wages were to be paid in the form of commission, and that impliedly created a contract to find employment for the servant. This contract is different, being to employ for wages which are to be paid at a certain rate per year. I do not think this can be read otherwise than as a contract by the master to retain the servant, and during the

(1) (1894) 71 L. T. 396. (2) [1891] 1 Q. B. 544.

time covered by the retainer to pay him wages under such a contract. It is within the province of the master to say that he will go on paying the wages, but that he is under no obligation to provide work. The obligation suggested is said to arise out of the undertaking to engage and employ the plaintiff as their representative salesman. It is said that if the salesman is not given employment which allows him to go on the market his hand is not kept in practice, and he will not be so efficient a salesman at the end of the term. To read in an obligation of that sort would be to convert the retainer at fixed wages into a contract to keep the servant in the service of his employer in such a manner as to enable the former to become au fait at his work. In my opinion, no such obligation arose under this contract, and it is a mistake to stretch the words of the contract so as to include in what is a mere retainer an obligation to employ the plaintiff continuously for the term of his service. I asked whether the employment must be de die in diem, and the answer was that this was not necessary, but I could not gather what, short of this, was the suggested obligation. It seems to me that the only argument open to the plaintiff was that his employment should be continuous, and I cannot find that obligation in the contract.

I think, therefore, that the case should not have been left to the jury, and that we ought to direct that judgment be entered for the defendants.

VAUGHAN WILLIAMS L.J. I entirely agree. In my opinion, if the facts are taken to be exactly in accordance with the plaintiff's evidence, there was no case to go to the jury. So far as the pleadings are concerned, the action is for breach of the terms contained in a written contract. It was put on behalf of the plaintiff that the action was based on a repudiation by the master of the contract with the plaintiff, and it was said that the plaintiff had a right to treat the case as if it were an action for wrongful dismissal, and is entitled to recover damages on that footing none the less because the master has been ready and willing to pay the wages agreed upon. For the purposes of my judgment I accept that suggested

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basis of action, but I still say that there was no case to go to the jury.

The first clause of the agreement contains the words "engage and employ," and the argument for the plaintiff is that because these words are used some obligation is thrown on the master which is not ordinarily created by the relation of master and servant. If it is said that the word "employ" must be so construed, the authority against this view is conclusive. In *Emmens* v. *Elderton* (1) the plaintiff, who was an attorney, was to receive 100*l.* a year as attorney and solicitor of a company. The promise set out in the second count was to "retain and employ" the plaintiff as attorney. The only matter that had to be argued in that case was whether the expression "retain and employ" added anything to the duty of the company towards their solicitor as expressed in the earlier part of the count. If it did, then the count was a bad one, and though the verdict of the jury had been for the plaintiff the defendant would have been entitled to have the verdict set aside. If, however, the words added nothing to the ordinary obligation on the company, the count was good. It was held in the Exchequer Chamber and in the House of Lords that the words did not of necessity add a jot to the contractual obligation of the employer. This is clearly set out in the opinions delivered by Crompton and Wightman JJ. in the House of Lords. We have to consider in the present case whether there is anything in this agreement to engage and employ the plaintiff which places on the defendants a wider obligation than that which a master ordinarily incurs towards his servant. I think that the first clause of the agreement is merely a clause of engagement or retainer. The second clause relates to remuneration, and the third to the duties to be performed by the servant in return for the remuneration. Of course, when a servant is engaged the capacity in which he is engaged is mentioned, and I do not think that the expression "representative salesman" which occurs in the agreement makes the case any stronger or throws any further obligation on the master. The case of a servant who is to be paid by

(1) 13 C. B. 495; 4 H. L. 624.

commission as in *Turner* v. *Goldsmith* (1) is entirely different. There the master is bound to give the opportunity of earning the remuneration. In *Bunning* v. *Lyric Theatre, Limited* (2), there is a great deal in the terms of the contract to shew that the having an opportunity of appearing as musical director was one of the considerations which the servant bargained that he should have from the master.

As my Lord has said, it was the duty of the judge to construe this contract, and we must now put a construction upon it. Looking at the matter in the way that is most favourable to the plaintiff, I think that there was no case to go to the jury, and that judgment should be entered for the defendants.

STIRLING L.J. Throughout the argument and at the present moment I feel more doubt as to the construction of this contract than my learned brethren. It is an agreement by which the defendants agreed to engage and employ the plaintiff, and the plaintiff agreed to devote the whole of his time to their service. The question is, What is the meaning of the word "employ" as used in this agreement? It seems to me clear, and if authority be required we find it in the case of *Emmens* v. *Elderton* (3), that the word "employ" is capable of two meanings—to retain in service, or to give actual work to be done by the person employed. There are many cases in which the nature of the work to be done shews which of these meanings should be adopted. Take the case of a medical man engaged for a term at a fixed payment. No one would say that employment must be found for him. On the other hand, in the case of an actor who accepts an engagement, it may be an important consideration with him to have an opportunity of displaying his abilities before the public, and it may be that there is an implied obligation on the part of the master to afford such an opportunity: *Fechter* v. *Montgomery*. (4) So in the case of a commission agent, to which reference has been made. The term "employ" being one with a flexible meaning, I feel the force of the argument that the plaintiff was to be employed in

(1) [1891] 1 Q. B. 544.
(2) 71 L. T. 396.
(3) 13 C. B. 495; 4 H. L. 624.
(4) (1863) 33 Beav. 22.

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the capacity of salesman to serve and to solicit orders, and so there should be a correlative duty on the employers to give him the opportunity of doing this. There was evidence given at the trial that in order that a salesman may duly perform his duties he must be in constant contact with the market. In that state of things there is some approximation to the case of an actor; but, as there are other elements pointed out by my learned brethren to which they attach weight, I am not prepared to differ from the conclusion at which they have arrived.

Appeal allowed.

Solicitors for plaintiff: *Wynne-Baxter & Keeble, for Beldon & Ackroyd, Bradford.*

Solicitors for defendants: *Wrensted & Hind, for G. Herbert Blackburn, Bradford.*

A. M.

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[IN THE COURT OF APPEAL.]

DICKSEE, APPELLANT; HOSKINS, RESPONDENT.

London County—Buildings—Part of Building used for Purposes of Trade, Part for Dwelling-house—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 74, *sub-s.* 2.

In a special case stated by a metropolitan police magistrate upon an objection raised by a district surveyor that s. 74, sub-s. 2, of the London Building Act, 1894, applied to a building about to be erected as a beer-house, the magistrate found as a fact that the basement and ground-floor of the building were intended to be used for the purpose of the trade of a beerhouse, and that the part above the ground-floor was intended to be used as a dwelling-house for the licensed occupier; but he held that the case was governed by the decision in *Carritt* v. *Godson*, [1899] 2 Q. B. 193, and overruled the objection of the district surveyor. The decision of the magistrate was affirmed by a Divisional Court. On appeal:—

Held, that the question whether the building was within s. 74, sub-s. 2, of the Act was concluded by the finding of fact in the case at bar, which was binding on the Court.

Judgment of the Divisional Court, [1901] 2 Q. B. 122, reversed.

APPEAL from the judgment of a Divisional Court, on a case stated by a metropolitan police magistrate, reported ante, p. 122, where the facts are stated.

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DICKSEE v. HOSKINS.

The appellant Dicksee was a district surveyor, and the respondent Hoskins was a builder. The question in dispute was whether s. 74, sub-s. 2, of the London Building Act, 1894, applied to a building which the respondent proposed to erect. This building was a licensed beerhouse to be erected on the site of an old beerhouse. Sect. 74, sub-s. 2, requires that in every building exceeding ten squares in area "used in part for purposes of trade or manufacture and in part as a dwelling-house, the part used for the purposes of trade or manufacture shall be separated from the part used as a dwelling-house" in the manner pointed out in the section. The case stated that the magistrate found as a fact that the basement and ground-floor of the building were intended to be used for the purposes of the trade of a beerhouse, and that the part above the ground-floor was intended to be used as a dwelling-house for the licensed occupier; but he held that the case was governed by the decision in *Carritt* v. *Godson* (1), and overruled the notice of objection of the district surveyor.

On the argument of the case stated the Divisional Court (Lord Alverstone C.J. and Lawrance J.) gave judgment for the respondent and dismissed the appeal. (2)

The appellant, the district surveyor, appealed.

Avory, K.C. (*Rowsell* with him), for the appellant. The decision in *Carritt* v. *Godson* (1) proceeded on an inference of fact drawn by the Court. In the present case the statement is explicit that part is to be used for the purposes of trade and part as a dwelling-house, and the case is thus brought within the express terms of the Act.

Danckwerts, K.C. (*Craies* with him), for the respondent. The question is whether the magistrate's decision was right in law. *Carritt* v. *Godson* (1) shews that where the trade is carried on throughout the building s. 74, sub-s. 2, does not apply. In that case the Court was dealing with a fully licensed house. This is a stronger case, because residence is essential in a licensed beerhouse.

Avory, K.C., in reply.

(1) [1899] 2 Q. B. 193. (2) Ante, p. 122.

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A. L. SMITH M.R. This is an appeal from a decision of the Lord Chief Justice and my brother Lawrance on a case stated by a metropolitan police magistrate.

The only difficulty that I have felt in this case is on the facts found by the learned magistrate, and I will say at once, though I have no jurisdiction to review the facts found in the case, that I do not agree with the finding. I agree with the view taken by my brothers Day and Lawrance in *Carritt* v. *Godson* (1), and I also agree with what the Lord Chief Justice said in this case; but he did not deal with the facts as found here, which in my judgment rule this case adversely to the decision at which the Divisional Court arrived. I have tried to read the facts in a way so as not to decide the case as I am about to do, and have failed.

The question arises under s. 74 of the London Building Act, 1894, which has certain provisions applicable to a building exceeding a certain size and used "in part for the purposes of a trade or manufacture and in part as a dwelling-house." It was held in *Carritt* v. *Godson* (1), under circumstances which it appears to me were identical with those of the present case, that a building did not come within the section, because the part used for the purposes of trade and the part used as a dwelling-house were not separate tenements, so that it was not requisite that there should be a fire-proof partition between them. It is impossible to read the judgments in that case without seeing that the decision proceeded on the ground that in a case like this of a public-house the trade of a publican is carried on all over the house.

In the present case there is a different finding from that in *Carritt* v. *Godson* (1), and by that finding we are bound. It is found as a fact that the basement and ground-floor of the building are intended to be used for the purpose of the trade of a beerhouse, and the part above the ground-floor is intended to be used for a dwelling-house by the licensed occupier. I cannot read that finding as meaning anything but what it clearly says, that a part of the building was intended to be used for the purpose of a trade, and that the part upstairs was

(1) [1899] 2 Q. B. 193.

to be used as a dwelling-house. Those are the facts with which I have to deal, and I cannot go behind them.

The case goes on to say that the learned magistrate held that the case was governed by *Carritt* v. *Godson* (1), and on that ground the magistrate allowed the appeal and overruled the objection raised by the district surveyor. I cannot understand why the magistrate has given the finding as to the trade and the dwelling-house, but he has done so, and I am bound by it. It is only on that express finding that I give a judgment reversing the decision of the Divisional Court and allowing the appeal.

VAUGHAN WILLIAMS L.J. I concur. I think it is a downright misfortune that a case of this sort should come up to be argued. The decision, so far as the construction and meaning of s. 74 of the London Building Act, 1894, is concerned, will be absolutely useless, and the county council will not be able to point to it as in any sense a decision as to the meaning of the section.

Speaking for myself, I should have preferred not to have accepted the finding of the learned magistrate as meaning that which my brethren think that it means, and which I agree is its primâ facie meaning. I should have preferred to have sent the case back to the learned magistrate. He has thought fit to make a finding which is somewhat ambiguous when he finds that "the basement and ground-floor of the building are intended to be used for the purposes of the trade of a beer-house, and the part above the ground-floor is intended to be used as a dwelling-house for the licensed occupier." These words are, to my mind, consistent with the finding in fact in the special case in *Carritt* v. *Godson* (1), that is to say, they are consistent with the fact that the trade was to be carried on throughout the premises, so that it could not be said that one part of the building was to be used for trade purposes and another part was to be used as a dwelling-house. The learned magistrate himself points to that being the proper construction, for he goes on to say that the case was governed by

(1) [1899] 2 Q. B. 193.

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the decision in *Carritt* v. *Godson*. (1) That was a decision based entirely upon the fact that, although there were certain rooms in the building which were used for living and sleeping purposes, yet, having regard to the nature of the house and the extent of the licence, the trade must be treated as carried on throughout the premises, so that there was no part of the premises as to which it was not a true statement of fact that the trade was carried on there. It seems to me that in the case of a beerhouse, where the licensed owner must reside upon the premises, such an inference of fact is an a fortiori inference. The primâ facie meaning of the finding of the magistrate in this case is that the state of things was exactly that described in s. 74, sub-s. 2, of the Act. He has said so in terms, and under those circumstances I am not prepared to differ from the conclusion at which the other members of the Court have arrived.

STIRLING L.J. I also concur most reluctantly in the view that has been expressed by the Master of the Rolls. As I understand the case of *Carritt* v. *Godson* (1), the magistrate there found as a fact that the building as to which there was a question was not a building used, or intended to be used, in part for the purpose of trade and in part as a dwelling-house. Here the learned magistrate has found in fact that the basement and ground-floor of the building were intended to be used for the purposes of the trade of a beerhouse, and that the part above the ground-floor was intended to be used as a dwelling-house for the licensed occupier. The findings of fact on the two cases are exactly contradictory. We have no jurisdiction to go beyond the findings of fact in the special case, and on that ground I think the appeal ought to be allowed.

Appeal allowed.

Solicitor for appellant: *W. A. Blaxland.*
Solicitor for respondent: *P. G. Gates.*

(1) [1899] 2 Q. B. 193.

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1901
July 8.

In re THE BALAGHÂT GOLD MINING COMPANY, LIMITED.

Company—Register of Members—Inspection—Right to take Copies—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 32.

The right conferred by s. 32 of the Companies Act, 1862, to inspect the register of members of a company under that Act, does not carry with it the right to take extracts from or to make copies of the entries in the register.

Boord v. *African Consolidated Land and Trading Co.*, [1898] 1 Ch. 596, overruled.

APPEAL from an order of Day J. at chambers.

An application was made at chambers under s. 32 of the Companies Act, 1862, for an order compelling the Balaghât Gold Mining Company, Limited, to allow the applicant to inspect the register of members of the company, and to take extracts from or to make copies of the entries on the register. It appeared that the applicant was not a member of the company, and that he attended at the offices of the company and tendered 1*s.*, stating that he claimed the right, not only to inspect the register, but to take copies of any part thereof. The company disputed his right to take copies, and declined to allow him to do so; but they offered to allow the applicant to inspect the register, and to supply him with any copies that he might require on payment of 6*d.* for every hundred words required to be copied. The applicant insisted on his right to take copies, and applied at chambers for an order compelling the company to allow him to do so. An order to that effect was made by a master, and that order was confirmed by the learned judge. (1)

The company appealed.

(1) Sect. 32 of the Companies Act, 1862, enacts: "The register of members . . . . shall . . . . be open to the inspection of any member gratis, and to the inspection of any other person on the payment of one shilling, or such less sum as the company may prescribe for each inspection; and

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BALAGHÂT GOLD MINING COMPANY, *In re.*

Swinfen Eady, K.C., and *Martelli*, for the company. The right of the applicant to inspect the register of members is not disputed; but he claims to be entitled to use the office of the company for the purpose of taking copies of all or part of the register, and to do so without making any payment. Sect. 32 prescribes what is the right of a person who requires to inspect, and it expressly says that he is to have that right, and the further right to require copies on payment for so much of the register as he requires to be copied. Cases under the Companies Clauses Acts, which are silent as to copies, are no authority in the present case. In those cases the right to inspect would be of no value without a right to take copies, and on that ground it has been held that this right should be implied. Here there is no room for implication, for the statute expresses the full rights of the person inspecting.

Pollard, for the applicant. The case is covered by the decision of North J. in *Boord* v. *African Consolidated Land and Trading Co.* (1) That decision, it is submitted, was right, and was in accordance with *Mutter* v. *Eastern and Midlands Railway* (2), a decision on the Companies Clauses Act, 1863, and *Nelson* v. *Anglo-American Land Mortgage Agency Co.* (3), a decison on s. 43 of the Act now before the Court. The two last-mentioned cases shew that the right to inspect carries with it the right to make that inspection effective by taking copies. The provision in s. 32 of the Companies Act, 1862, that copies may be required, is not inconsistent with the right to take copies, but is an independent advantage given to a person who is not in a position to take copies personally.

A. L. SMITH M.R. The point raised in this case is as to obtaining copies of the register of members of a company under the 32nd section of the Companies Act, 1862, and the

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every such member or other person may require a copy of such register, or of any part thereof, ... on payment of sixpence for every hundred words required to be copied . . . . any judge sitting in chambers . . . . may by order compel an immediate inspection of the register."

(1) [1898] 1 Ch. 596.
(2) (1888) 38 Ch. D. 92.
(3) [1897] 1 Ch. 130.

first thing required is to see if the meaning of the section is plain. If it is plain, cases arising on other statutory enactments somewhat like but not identical with the one we are considering will not assist the Court. This is not a claim of a common law right, but one that must be decided on the terms of the statute. The question is whether the statute empowers the applicant to go to the office of the company and himself personally take copies of the register without paying anything. The statute says that the register is to be open to the inspection of any member of the company gratis, and of any other person on payment, and that the member or other person may require a copy of the register, or any part thereof, and for what he requires he is to make a payment of 6*d.* for every hundred words required to be copied. I quite agree with what fell from Lindley L.J. and other members of this Court in *Mutter* v. *Eastern and Midlands Railway* (1), but that case was not decided upon this statute, but upon the Companies Clauses Acts. There is no case that binds us, but the matter came before North J. in *Boord* v. *African Consolidated Land and Trading Co.* (2), and that learned judge, mainly, as I think, on a consideration of cases not arising under this statute, came to the conclusion that the right to inspect carries with it the right to take copies. I cannot bring myself to agree with that view. It seems to me that the statute fenced the right of the person inspecting, with regard to copies, by saying that he may require a copy of any portion of the register. That is not language to describe taking a copy, and, further, there is another restriction that he is to pay 6*d.* per hundred words for such portions of the register as he requires to be copied. In my opinion, it is not the true construction of the statute, on which alone the right to copies of the register depends, to say that the person inspecting is entitled to take a copy and to take it without paying anything. In *Mutter* v. *Eastern and Midlands Railway* (1) Lindley L.J. finishes his judgment by stating the ground on which he came to the conclusion at which he arrived. He says: "Upon the ground, therefore, that in this case the right to take a copy cannot be denied

(1) 38 Ch. D. 92. (2) [1898] 1 Ch. 596.

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without rendering the right to inspect practically useless, I am of opinion that the order appealed from (which permitted the applicant to take copies) was correct." That does not apply to this case, because the person who inspects can get such copies as he requires by paying for them. I think, therefore, that this appeal should be allowed.

VAUGHAN WILLIAMS L.J. I entirely agree. It seems to me that it is admitted on behalf of the applicant that his rights, whatever they are, must be determined by the true construction of the statute, but that we are asked to read it as if it included the words which are to be found in Order XXXI., r. 15. If there were express words in the statute permitting the taking of copies the applicant would be right, but the Act does not say so. The whole right that the Act gives as to copies is the express right to be furnished with a copy on payment. It seems to me that, under these circumstances, the right to take copies himself without paying for them is excluded.

STIRLING L.J. I am of the same opinion. The only doubt I have felt arises from the decision of North J., which is entitled to great weight. The learned judge relied on *Mutter* v. *Eastern and Midlands Railway* (1), and it is, therefore, necessary to see what was the ground of the decision in that case. It did not arise under s. 32 of the Companies Act, 1862, but on s. 28 of the Companies Clauses Act, 1863. That clause is silent as to copies of the documents that may be inspected. Lindley L.J. in the course of his judgment pointed out that when the right to take copies, where there is inspection, is not expressly conferred by statute, the extent of the right of the applicant as to taking copies depends on the interest which he has in what he wants to copy. The Lord Justice further pointed out that, Parliament having conferred the right to inspect, the Court ought not so to construe the statute as to render the right conferred illusory, and on that ground he held that the right to take copies ought to be allowed. In the case

(1) 38 Ch. D. 92.

before us the statute is not silent as to the right to obtain copies. It provides that the register is to be open to inspection, and that copies may be required on payment of 6*d.* for every hundred words required to be copied; so that at a not very expensive rate the person who inspects the register may obtain copies of any portion that he desires, or of the whole if he so desires. Under these circumstances it cannot be said that the right to inspect without a right to take copies would render the statute of no avail.

On these grounds I am unable to agree with the judgment of North J., which is cited as an authority for the order made at chambers, and I think that the appeal should be allowed.

Appeal allowed.

Solicitors for applicant: *A'Beckett, Terrell & Co.*

Solicitors for company: *Francis & Johnson.*

A. M.

DULIEU *v.* WHITE & SONS.

1901

May 17; *June* 5.

Negligence—Nervous Shock resulting from Fright—Remoteness of Damage.

Damages which result from a nervous shock occasioned by fright unaccompanied by any actual impact may be recoverable in an action for negligence if physical injury has been caused to the plaintiff.

Victorian Railways Commissioners v. *Coultas*, (1888) 13 App. Cas. 222, not followed.

POINT of law raised by pleadings.

The statement of claim was as follows:—

"1. The plaintiff is the wife of Arthur David Dulieu, who carries on the business of a licensed victualler at the Bonner Arms, Bonner Street, Bethnal Green, in the county of London.

"2. On July 20, 1900, the plaintiff was behind the bar of her husband's said public-house, she being then pregnant, when the defendants by their servant so negligently drove a pair-horse van as to drive it into the said public-house.

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"3. The defendants were also negligent in entrusting the driving of the said horses and van to their said servant, who had no knowledge or skill in driving.

"4. The plaintiff in consequence sustained a severe shock, and was and is seriously ill, and on September 29, 1900, gave premature birth to a child.

"5. In consequence of the shock sustained by the plaintiff the said child was born an idiot.

"The plaintiff claims damages in respect of the aforesaid matters."

The statement of defence, after denying the allegations contained in the statement of claim, proceeded:—

"3. The defendants submit as a matter of law that the damages sought to be recovered herein are too remote, and that the statement of claim on the face thereof discloses no cause of action."

G. Spencer Bower, for the defendants.

Ritter, for the plaintiff.

Cur. adv. vult.

June 5. KENNEDY J. read the following judgment:—In this case the only question for the judgment of the Court is in the nature of a demurrer. The defendants have pleaded as a matter of law that the damages sought to be recovered are too remote, and that the statement of claim upon its face discloses no cause of action.

The statement of claim alleges that on July 20, 1900, the plaintiff, then being in a state of pregnancy, was behind the bar of her husband's public-house, and that the defendants by their servant negligently drove a pair-horse van into the public-house. It goes on to allege in paragraph 4 that the plaintiff in consequence sustained a severe shock and was seriously ill, and on September 29 following gave premature birth to a child, and, in paragraph 5, that in consequence of the shock sustained by the plaintiff the said child was born an idiot. Then follows the claim for damages.

The matter we have to decide is whether, if it be proved at

the trial that the defendants' servant did negligently manage a pair-horse van, and by reason of his negligence drove it into the part of the public-house where the plaintiff was, and did thereby cause her such a nervous shock as to make her ill in body and suffer bodily pain in the way alleged, the plaintiff has a good cause of action for damages under paragraph 4. The head of damage alleged in paragraph 5 was rightly treated by the plaintiff's counsel as untenable.

The defendants' counsel summed up his contention against the legal validity of the plaintiff's claim in the statement that no action for negligence will lie where there is no immediate physical injury resulting to the plaintiff. He has argued that the bodily harm, which in the present case resulted to the plaintiff through the shock received by her through the inroad of the van and horses into the room in which she was, and which so acted upon her in her then state of health as to produce the bodily harm, was in point of law too remote a consequence of the negligence of the defendants' servant.

My brother Phillimore and I agree that this contention ought not to be upheld; but as we arrive at this result by somewhat different courses of reasoning, and the case is upon the authorities not free from difficulty and raises points of general interest, I think that I ought to state the considerations which have led me to my conclusion.

This is an action on the case for negligence—that is to say, for a breach on the part of the defendants' servant of the duty to use reasonable and proper care and skill in the management of the defendants' van. In order to succeed, the plaintiff has to prove resulting damage to herself and "a natural and continuous sequence uninterruptedly connecting the breach of duty with the damage as cause and effect." (1) In regard to the existence of the duty here, there can, I think, be no question. The driver of a van and horses in a highway owes a duty to use reasonable and proper care and skill so as not to injure either persons lawfully using the highway, or property adjoining the highway, or persons who, like the plaintiff, are

(1) Shearman and Redfield, Negligence, cited in Beven, Negligence in Law, 2nd ed. p. 7.

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lawfully occupying that property. His legal duty towards all appears to me to be practically identical in character and in degree. I understood the plaintiff's counsel to suggest that there might exist a higher degree of duty towards the plaintiff sitting in a house than would have existed had she been in the street. I am not satisfied that this is so. The wayfarer in the street, as it seems to me, has in law as much right of redress if he is injured in person or in property by the negligence of another as the man who is lawfully sitting on a side-wall or in an adjoining house. "The whole law of negligence assumes the principle of 'Volenti non fit injuria' not to be applicable," for reasons which Sir Frederick Pollock points out (1) in a passage which follows the quotation which I have just made. The legal obligations of the driver of horses are the same, I think, towards the man indoors as to the man out of doors; the only question here is whether there is an actionable breach of those obligations if the man in either case is made ill in body by such negligent driving as does not break his ribs but shocks his nerves.

Before proceeding to consider the objections to the maintenance of such a claim as that of the present plaintiff, it is, I think, desirable for clearness' sake to see exactly what are the facts which ought to be assumed for the purposes of the argument. We must assume in her favour all that can be assumed consistently with the allegations of the statement of claim. We must, therefore, take it as proved that the negligent driving of the defendants' servant reasonably and naturally caused a nervous or mental shock to the plaintiff by her reasonable apprehension of immediate bodily hurt, and that the premature childbirth, with the physical pain and suffering which accompanied it, was a natural and a direct consequence of the shock. I may just say in passing that I use the words "nervous" and "mental" as interchangeable epithets on the authority of the judgment of the Privy Council in *Victorian Railways Commissioners* v. *Coultas* (2); but I venture to think "nervous" is probably the more correct epithet where terror

(1) The Law of Torts, by Sir F. Pollock, 6th ed. pp. 166, 167.
(2) 13 App. Cas. 222.

operates through parts of the physical organism to produce bodily illness, as in the present case. The use of the epithet "mental" requires caution, in view of the undoubted rule that merely mental pain unaccompanied by any injury to the person cannot sustain an action of this kind. (1)

Now, these being the assumed facts, what are the defendants' arguments against the plaintiff's right to recover damages in this action?

First of all, it is argued, fright caused by negligence is not in itself a cause of action—ergo, none of its consequences can give a cause of action. In *Mitchell* v. *Rochester Ry. Co.* (2) the point is put thus (3): "That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely shew the degree of fright or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright." With all respect to the learned judges who have so held, I feel a difficulty in following this reasoning. No doubt damage is an essential element in a right of action for negligence. I cannot successfully sue him who has failed in his duty of using reasonable skill and care towards me unless I can prove some material and measurable damage. If his negligence has caused me neither injury to property nor physical mischief, but only an unpleasant emotion of more or less transient duration, an essential constituent of a right of action for negligence is lacking. "Fear," as Sir Frederick Pollock has stated (4), "taken alone falls short of being actual damage not because it is a remote or unlikely consequence, but because it can be proved and measured only by physical effects." It may, I conceive, be truly said that, viewed in relation to an action for negligence, direct bodily impact is, without resulting damage, as insufficient a ground of legal claim as the infliction of fright. That fright—where physical injury is directly produced by it—cannot be a ground of action merely because of the absence of any accompanying impact appears to

(1) Beven, Negligence in Law, 2nd ed. p. 77.

(2) (1896) 151 N. Y. 107.

(3) 151 N. Y. at pp. 109, 110.

(4) The Law of Torts, 6th ed. p. 51.

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me to be a contention both unreasonable and contrary to the weight of authority. Leaving out of sight, as perhaps involving special considerations, cases of wilful wrong-doing such as *Wilkinson* v. *Downton* (1), decided by my brother Wright in a civil court, and the authorities as to criminal responsibility which are cited in Mr. Beven's work (2) we have as reported decisions, which go far in my judgment to negative the correctness of any such contention, *Jones* v. *Boyce* (3), *Harris* v. *Mobbs* (4), and *Wilkins* v. *Day*. (5) All the three cases are cited by Wright J. in his judgment in *Wilkinson* v. *Downton* (6), and he there explains the judgment given in favour of the plaintiff in each of them on the ground that the fright occasioned by the defendant's wrong-doing to the passenger in the earliest case, and to the horse in the two later cases, properly ought, in the circumstances, to be regarded as the direct and immediate cause of the damage which ensued. In other words, an action was held to lie where the only physical impact did not accompany but was a consequence of the fright. Further, we have directly in point the decision given in December, 1882, by the Common Pleas Division in Ireland under the presidency of the present Lord Morris in the unreported case of *Byrne* v. *Great Southern and Western Railway Company of Ireland* (7), and affirmed on appeal in a judgment delivered by the late Sir Edward Sullivan, and the approval of this decision in 1890 by the Exchequer Division in *Bell* v. *Great Northern Railway of Ireland*. (8) In the course of his judgment in the last cited case Palles C.B. expressly points out (9) that in the circumstances in *Byrne* v. *Great Southern and Western Railway Company of Ireland* (7) there was nothing in the nature of impact, and the portions of the evidence which he quotes clearly shew that this was so. In *Victorian Railways Commissioners* v. *Coultas* (10), which was much relied upon by the defendants in the argument before us,

(1) [1897] 2 Q. B. 57.
(2) Negligence in Law, 2nd ed. pp. 81, 82.
(3) (1816) 1 Stark. 493; 18 R. R. 812.
(4) (1878) 3 Ex. D. 268.
(5) (1883) 12 Q. B. D. 110.
(6) [1897] 2 Q. B. at p. 61.
(7) Unreported.
(8) (1890) 26 L. R. Ir. 428.
(9) 26 L. R. Ir. at p. 442.
(10) 13 App. Cas. 222.

and to which I shall have to refer more fully later on, the Privy Council expressly declined to decide that impact was necessary. If impact be not necessary, and if, as must be assumed here, the fear is proved to have naturally and directly produced physical effects, so that the ill results of the negligence which caused the fear are as measurable in damages as the same results would be if they arose from an actual impact, why should not an action for those damages lie just as well as it lies where there has been an actual impact? It is not, however, to be taken that in my view every nervous shock occasioned by negligence and producing physical injury to the sufferer gives a cause of action. There is, I am inclined to think, at least one limitation. The shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself. A. has, I conceive, no legal duty not to shock B.'s nerves by the exhibition of negligence towards C., or towards the property of B. or C. The limitation was applied by Wright and Bruce JJ. in the unreported case of *Smith* v. *Johnson & Co.* (1), referred to by Wright J. at the close of his judgment in *Wilkinson* v. *Downton.* (2) In *Smith* v. *Johnson & Co.* (1) a man was killed by the defendant's negligence in the sight of the plaintiff, and the plaintiff became ill, not from the shock produced by fear of harm to himself, but from the shock of seeing another person killed. The Court held that this harm was too remote a consequence of the negligence. I should myself, as I have already indicated, have been inclined to go a step further, and to hold upon the facts in *Smith* v. *Johnson & Co.* (1) that, as the defendant neither intended to affect the plaintiff injuriously nor did anything which could reasonably or naturally be expected to affect him injuriously, there was no evidence of any breach of legal duty towards the plaintiff or in regard to him of that absence of care according to the circumstances which Willes J. in *Vaughan* v. *Taff Vale Ry. Co.* (3) gave as a definition of negligence. Sir Frederick Pollock begins the passage in his work on Torts, 6th ed. p. 50,

(1) Unreported.

(2) [1897] 2 Q. B. 57, at p. 61.

(3) (1860) 5 H. & N. 679, at p. 688.

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in which he discusses the point at issue before us with a question which assumes the limitation. The learned author puts the inquiry in this form: "Where a wrongful or negligent act of A. threatening Z. with immediate bodily hurt, but not causing such hurt, produces in Z. a sudden terror or 'nervous shock' from which bodily illness afterwards ensues, is this damage too remote to enter into the measure of damages if A.'s act was an absolute wrong, or to give Z. a cause of action if actual damage is the gist of the action?" In order to illustrate my meaning in the concrete, I say that I should not be prepared in the present case to hold that the plaintiff was entitled to maintain this action if the nervous shock was produced, not by the fear of bodily injury to herself, but by horror or vexation arising from the sight of mischief being threatened or done either to some other person, or to her own or her husband's property, by the intrusion of the defendants' van and horses. The cause of the nervous shock is one of the things which the jury will have to determine at the trial.

It remains to consider the second and somewhat different form in which the defendants' counsel put his objection to the right of the plaintiff to maintain this action. He contended that the damages are too remote, and relied much upon the decision of the Privy Council in *Victorian Railways Commissioners* v. *Coultas*. (1) In that case the principal circumstances were that the appellants' gate-keeper negligently invited the male plaintiff and his wife, who were driving in a buggy, to enter the gate at a crossing when a train was approaching, and, though there was no actual collision with the train, the escape was so narrow and the danger so alarming that the lady fainted and suffered a severe nervous shock, which produced illness and a miscarriage. The Colonial Court had entered judgment for the plaintiff for the amount found by the jury at the trial of the action brought against the appellants for negligence. The Privy Council reversed this decision. The principal ground of their judgment is formulated in the following sentence: "Damages arising from mere sudden terror unaccompanied by any actual physical injury but occasioning a

(1) 13 App. Cas. 222.

nervous or mental shock cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper." (1) A judgment of the Privy Council ought of course to be treated by this Court as entitled to very great weight indeed; but it is not binding upon us, and, in venturing most respectfully not to follow it in the present case, I am fortified by the fact that its correctness was treated by Lord Esher M.R. in his judgment in *Pugh* v. *London, Brighton & South Coast Ry. Co.* (2) as open to question; that it was disapproved by the Exchequer Division in Ireland in *Bell* v. *Great Northern Railway Company of Ireland* (3), where, in the course of his judgment, Palles C.B. gives a reasoned criticism of the Privy Council judgment, which, with all respect, I entirely adopt; and, lastly, by the fact that I find that the judgment has been unfavourably reviewed by legal authors of recognised weight such as Mr. Sedgwick (4), Sir Frederick Pollock (5), and Mr. Beven. (6) Why is the accompaniment of physical injury essential? For my own part, I should not like to assume it to be scientifically true that a nervous shock which causes serious bodily illness is not actually accompanied by physical injury, although it may be impossible, or at least difficult, to detect the injury at the time in the living subject. I should not be surprised if the surgeon or the physiologist told us that nervous shock is or may be in itself an injurious affection of the physical organism. Let it be assumed, however, that the physical injury follows the shock, but that the jury are satisfied upon proper and sufficient medical evidence that it follows the shock as its direct and natural effect, is there any legal reason for saying that the damage is less proximate in the legal sense than damage which arises contemporaneously? "As well might it be said" (I am quoting from the judgment of Palles C.B. (7)) "that a death caused by poison is not to be

(1) 13 App. Cas. at p. 225.
(2) [1896] 2 Q. B. 248, at p. 250.
(3) 26 L. R. Ir. 428.
(4) On Damages, 8th ed. p. 861.
(5) The Law of Torts, 6th ed. pp. 50–52.
(6) Negligence in Law, 2nd ed. pp. 76–83.
(7) 26 L. R. Ir. at p. 439.

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attributed to the person who administered it because the mortal effect is not produced contemporaneously with its administration." Remoteness as a legal ground for the exclusion of damage in an action of tort means, not severance in point of time, but the absence of direct and natural causal sequence—the inability to trace in regard to the damage the "propter hoc" in a necessary or natural descent from the wrongful act. As a matter of experience, I should say that the injury to health which forms the main ground of damages in actions of negligence, either in cases of railway accidents or in running-down cases, frequently is proved, not as a concomitant of the occurrence, but as one of the sequelæ.

To one other point only in the judgment in *Victorian Railways Commissioners* v. *Coultas* (1) will I now refer. The judgment proceeds (2): "If it were held that they can, it appears to their Lordships that it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury." I find, with all respect, a difficulty in appreciating this argument, because in that case, as is to be assumed in this, there was evidence of actual physical illness, not only of a mental pain, and the defendants, if the verdict on this part of the case was against the weight of the evidence, should have moved for a new trial. The case standing as it did, it is difficult to see how a decision on the appeal in favour of the respondents would have sanctioned the maintenance of an action for merely mental hurt.

The counsel for the defendant on the argument before us referred also to two American cases. One I have already mentioned, *Mitchell* v. *Rochester Ry. Co.* (3) The Court of Appeals of the State of New York did no doubt there hold, both, as I have already stated, that no recovery may be had for fright, and also that it could not properly be said that the plaintiff's miscarriage in that case was the proximate result of the defendants'

(1) 13 App. Cas. 222. (2) 13 App. Cas. at p. 225.
(3) 151 N. Y. 107.

negligence. Shortly, the facts there were that the plaintiff, whilst waiting for a tram-car, was nearly run over by the negligent management of the defendants' servant of a car drawn by a pair of horses, and owing to terror so caused fainted, lost consciousness, and subsequently had a miscarriage and consequent illness. The Court upon the present point base their decision, to use their own language, upon a view that the injuries (1) "were plainly the result of an accidental or unusual combination of circumstances which could not have been reasonably anticipated, and over which the defendant had no control." I can only say, with due deference to the learned judges who so decided, that I cannot assent upon the assumed state of facts, which was that the defendants' driver by negligent driving threatened the plaintiff with immediate bodily injury, and by that threat caused her terror which produced the physical injuries above mentioned. Whether the terror was in the circumstances a natural and reasonable result of the threat was a question of fact for the jury. It must be taken, I think, that they so found. But if the damages thus occasioned ought to be held not to be proximate, it seems to me to be difficult to maintain the correctness of the decisions in *Jones* v. *Boyce* (2), *Wilkins* v. *Day* (3), and *Harris* v. *Mobbs*. (4) It may be admitted that the plaintiff in this American case would not have suffered exactly as she did, and probably not to the same extent as she did, if she had not been pregnant at the time; and no doubt the driver of the defendants' horses could not anticipate that she was in this condition. But what does that fact matter? If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart.

The other American case cited for the defendants is *Spade* v. *Lynn and Boston Rail Road* (5), decided by the Supreme

(1) 151 N. Y. at p. 110.
(2) 1 Stark. 493; 18 R. R. 812.
(3) 12 Q. B. D. 110.
(4) 3 Ex. D. 268.
(5) (1897) 60 Am. St. Rep. 393; 168 Mass. 285. *Spade* v. *Lynn and Boston Rail Road Co.* appears to have been tried a second time after

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Judicature Court of Massachusetts in 1897. The Court there held, as appears in the head-note of the report, that in an action to recover damages for an injury sustained through the negligence of another there can be no recovery for a bodily injury caused by mere fright and mental disturbance. But whilst the decision is thus in the result in accordance with the New York case, it is nevertheless given upon different grounds. In his interesting judgment, Allen J., who delivered the decision of the Court, admits fully that which, as I have pointed out, the New York Court denied, namely, that damages for physical injury caused through fright, which is occasioned by negligent conduct, are in principle not too remote. "A physical injury," he says (1), "may be directly traceable to fright, and so may be caused by it. We cannot say, therefore, that such consequences may not flow proximately from unintentional negligence, and if compensation in damages may be recovered for a physical injury so caused, it is hard on principle to say why there should not be also a recovery for the mere mental suffering when not accompanied by any perceptible physical effects." This reasoning concedes more than the present plaintiff asks, for she asks to be compensated in damages only if she proves physical injury. The learned judge then proceeds to state why the right to recover, which on principle ought to exist, is in his view properly refused. "It would seem therefore," he says (1), "that the real reason for refusing damages sustained from mere fright must be something different, and it probably rests on the ground that in practice it is impossible satisfactorily to administer any other rule." He goes on to develope his argument on the ground of public policy—the hardship of holding persons

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the decision of Allen J., reported 168 Mass. 285; 60 Am. St. Rep. 393. At the second trial it was proved that the defendants' conductor in removing a passenger from the car jostled another passenger and caused him to fall on the plaintiff, which of itself was a trifling matter, but the fright resulted in physical injury. This second trial resulted also in a verdict for the plaintiff; but the defendants again alleged exceptions which were sanctioned in a judgment of Holmes J. in January 1899, reported 172 Mass. 488; 70 Am. St. Rep. 298.

(1) 60 Am. St. Rep. at p. 395.

bound to anticipate and guard against anything but the probable consequences to ordinary people (in which it is clear he considers that the consequences of fright should not be included), and the risk of opening "a wide door for unjust claims which could not successfully be met." He refers amongst other cases to *Victorian Railways Commissioners* v. *Coultas* (1); and it will be seen on a reference to the report of that case (2) that while the judgment of the Privy Council proceeds mainly upon the view that the damages are too remote, it does also claim justification from the argument of public policy and the danger which would arise from a contrary decision on account of "a wide field opened for imaginary claims." Naturally one is diffident of one's opinion when one finds that it is not in accord with those which have been expressed by such judicial authorities as those to which I have just referred. But certainly, if, as is admitted, and I think justly admitted, by the Massachusetts judgment, a claim for damages for physical injuries naturally and directly resulting from nervous shock which is due to the negligence of another in causing fear of immediate bodily hurt is in principle not too remote to be recoverable in law, I should be sorry to adopt a rule which would bar all such claims on grounds of policy alone, and in order to prevent the possible success of unrighteous or groundless actions. Such a course involves the denial of redress in meritorious cases, and it necessarily implies a certain degree of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this class of claim. My experience gives me no reason to suppose that a jury would really have more difficulty in weighing the medical evidence as to the effects of nervous shock through fright, than in weighing the like evidence as to the effects of nervous shock through a railway collision or a carriage accident, where, as often happens, no palpable injury, or very slight palpable injury, has been occasioned at the time.

I have now, I think, dealt with the authorities and the arguments upon which the defendants rely, and I have done so at greater length than I should have wished to do but for the

(1) 13 App. Cas. 222. (2) 13 App. Cas. at p. 226.

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general interest of the points involved and the difficulties which the conflict of authorities undoubtedly present. In this conflict I prefer, as I have already indicated, the two decisions of the Irish Courts. They seem to me to constitute strong and clear authorities for the plaintiff's contention. It was suggested on the part of the defendants that the applicability of the judgment in *Bell* v. *Great Northern Railway Company of Ireland* (1) is affected by the fact that the female plaintiff in that action was a passenger on the defendants' railway, and as such had contractual rights. It appears to me that in the circumstances this fact can make no practical difference whatever. In the Irish case there was no special contract, no notice to the railway company when they accepted her as a passenger, that she was particularly delicate, or peculiarly nervous or liable to fright. The contractual duty existed, as it often does exist, concurrently with the duty apart from contract; but the one is in such circumstances practically coextensive with the other in the rights which it gives and the corresponding liabilities which it imposes.

I hold that, if on the trial of this action the jury find the issues left to them as the jury found them in *Bell* v. *Great Northern Railway Company of Ireland* (1), after the direction of Andrews J., which was approved by the Exchequer Division, the plaintiff will have made out a good cause of action.

PHILLIMORE J. read the following judgment:—The discussion in this case has ranged over wide ground, and many points have been brought to our notice.

It will not, I hope, be thought that these matters have been omitted from consideration or not materially considered because I am able to put my conclusions into a comparatively narrow compass.

I think there may be cases in which A. owes a duty to B. not to inflict a mental shock on him or her, and that in such a case, if A. does inflict such a shock upon B.—as by terrifying B.—and physical damage thereby ensues, B. may have an

(1) 26 L. R. Ir. 428.

action for the physical damage, though the medium through which it has been inflicted is the mind.

I think, for example, that it may well be, as the Exchequer Division in Ireland held in the case of *Bell* v. *Great Northern Railway Company of Ireland* (1), that a railway company has a duty to its passengers to use its best endeavours to convey them, not merely safely, but securely in the etymological sense of the word, and that when it fails, and physical damage accrues to a passenger through the fright which its failure occasions, the passenger may have an action.

I cordially accept the decision of my brother Wright in *Wilkinson* v. *Downton* (2) that every one has a legal right to his personal safety, and that it is a tort to destroy this safety by wilfully false statements and thereby to cause a physical injury to the sufferer. In that case it will be observed that the only physical action of the wrong-doer was that of speech.

I think there is some assistance to be got from the cases where fear of impending danger has induced a passenger to take means of escape which have in the result proved injurious to him, and where the carrier has been held liable for these injuries, as in *Jones* v. *Boyce*. (3) The limit of the application of this principle is shewn in *Adams* v. *Lancashire and Yorkshire Ry. Co.* (4)

These principles and cases seem to establish that terror wrongfully induced and inducing physical mischief gives a cause of action. Against them is to be set the weighty authority of *Victorian Railways Commissioners* v. *Coultas*. (5) This is an authority to be treated with the utmost respect, but no more binding on us even as to the res decisa than it was upon the Exchequer Division in Ireland. Still less are the special reasons for the decision binding. I do not know whether I should or should not have come unaided to the same conclusion as that which was in that case arrived at; but I think it possible that I should, though not for the reasons which have prominence in the judgment. It must be conceded on behalf

(1) 26 L. R. Ir. 428.
(2) [1897] 2 Q. B. 57.
(3) 1 Stark. 493; 18 R. R. 812.
(4) (1869) L. R. 4 C. P. 739.
(5) 13 App. Cas. 222.

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of the plaintiff that to give rise to a cause of action the act which terrifies must be either wilful or negligent. Negligence is a breach of duty owed to the person complaining. It is not certain that as between people travelling on highways there is any duty so carefully to conduct yourself or your vehicle as not to frighten others. It is a duty so carefully to conduct yourself or your vehicle as not to cause collision or some other form of direct physical damage.

The gate-keeper in the *Victorian Railways Case* (1) was careless in opening the gate when the train was coming, and would have rendered his railway liable if there had been actual impact, even if the actual impact was produced by a wrong manœuvre taken under the influence of fear: see per James L.J. in *The Bywell Castle*. (2) But it may be nevertheless that in such circumstances a railway is not liable if there be escape of actual impact, however narrowly. There are dangers sometimes from the traffic at Charing Cross which might frighten not only an inexperienced and elderly countrywoman, but an experienced and cool citizen, the ideal vir constans for whom ἐμπειρία makes ἀνδρεία. But if physical consequences were induced by terror so produced, it may be that there would be no cause of action. This principle is suggested, though in language perhaps open to criticism, by Bramwell B. in *Holmes* v. *Mather*. (3) It may be (I do not say that it is so) that a person venturing into the streets takes his chance of terrors. If not fit for the streets at hours of crowded traffic, he or she should not go there. But if a person being so unfit either permanently or temporarily stays at home, he or she may well have a right to his or her personal safety, giving to these words the meaning given by my brother Wright J., and wilfully or negligently to invade this right and so induce physical damage may give an action. In the case before us the plaintiff, a pregnant woman, was in her house. It is said that she was not the tenant in possession and could not maintain trespass quare clausum fregit, if this had been a direct act of the defendant and not of his servant (as it was). This is true: her

(1) 13 App. Cas. 222. (2) (1879) 4 P. D. 219, at p. 223.
(3) (1875) L. R. 10 Ex. 261.

husband was in possession. But none the less it was her home, where she had a right, and on some occasions a duty, to be; and it seems to me that if the tenant himself could maintain an action, his wife or child could do likewise. It is averred that by reason of the careless driving of the defendants' servant a pair-horse van came some way into the room, and so frightened her that serious physical consequences thereby befell her. If these averments be proved, I think that there was a breach of duty to her for which she can have damages. The difficulty in these cases is to my mind not one as to the remoteness of the damage, but as to the uncertainty of there being any duty. Once get the duty and the physical damage following on the breach of duty, and I hold that the fact of one link in the chain of causation being mental only makes no difference. The learned counsel for the plaintiff has put it that every link is physical in the narrow sense. That may be or may not be. For myself, it is unimportant.

The American cases to which we have been referred are worthy of much attention and respect. As to the decision of the Court of Appeal in *Mitchell* v. *Rochester Ry. Co.* (1), I would make the same observations as I have made on the *Victorian Railways Case.* (2) I accept the reasoning in the case of *Spade* v. *Lynn and Boston Rail Road* (3), and I think I should have come to the same decision. But I should not have expressed it in such broad and sweeping language. The following passage, which I only discovered after I had written the first part of my judgment, exactly expresses what I mean up to a certain point (4): "Not only the transportation of passengers and the running of trains, but the general conduct of business and of the ordinary affairs of life, must be done on the assumption that persons who are liable to be affected thereby are not peculiarly sensitive, and are of ordinary physical and mental strength. If, for example, a traveller is sick or infirm, delicate in health, specially nervous or emotional, liable to be upset by slight causes, and therefore requiring precautions

(1) 151 N. Y. 107.
(2) 13 App. Cas. 222.
(3) 60 Am. St. Rep. 393; 168 Mass. 285.
(4) 60 Am. St. Rep. at p. 395.

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which are not usual or practicable for travellers in general, notice should be given, so that, if reasonably practicable, arrangements may be made accordingly, and extra care be observed. But as a general rule a carrier of passengers is not bound to anticipate or to guard against an injurious result which would only happen to a person of peculiar sensitiveness." Aliter in this case, where the plaintiff is not a passenger nor a traveller.

Our judgment must be for the plaintiff with costs. I do not, however, think that she has any lawful claim for damages in respect of the matters stated in paragraph 5 of her statement of claim. This, indeed, her learned counsel has abandoned.

Judgment for the plaintiff.

Solicitors for plaintiff: *H. Dade & Co.*
Solicitors for defendants: *William Hurd & Son.*

A. P. P. K.

[IN THE COMMERCIAL COURT.]

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June 18, 25.

THE PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY *v.* THE KING.

Ship—Accommodation for Seamen—Lascars—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 210.

The provisions of s. 210 of the Merchant Shipping Act, 1894, which require that a certain amount of space shall be provided for seamen on board any British ship, apply to Lascars serving on board such ships.

PETITION OF RIGHT presented by the Peninsular and Oriental Steam Navigation Company, and tried before Mathew J. without a jury in the Commercial Court.

The petitioners are a corporation owning ships trading between England and India, China, and Australia respectively, and they have for many years employed to navigate their steamers a class of British subjects, natives of India, known as Lascars, as well as European seamen and apprentices. The agreements with the Lascars are entered into in British India,

and are in the form and with the provisions approved by the Governor-General of India in Council. Among the petitioners' ships were the *Australia*, trading between England and Australia, and the *Oriental*, trading between England and India.

For many years the crew space provided for the Lascars has largely exceeded the crew space required to be provided for Lascars by the Indian Act of 1876 (1876, No. 13), s. 9, in cases to which that section is applicable, but it has fallen short of the crew space required to be provided for seamen by s. 210 of the Merchant Shipping Act, 1894, in cases to which that section is applicable.

Both the *Australia* and the *Oriental* had been registered in the United Kingdom previous to the passing of the Merchant Shipping Act, 1894, in accordance with the provisions of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104).

A surveyor of ships appointed by the Board of Trade inspected the crew space occupied by the Lascars in the *Australia* and in the *Oriental*, and, alleging that the provisions of s. 210 of the Merchant Shipping Act, 1894, had not been complied with, reported the fact to the appropriate chief officer of Customs, who thereupon altered the registered tonnage of the two ships respectively, and disallowed the deduction of crew space from the tonnage. The petitioners admitted that, if Lascars were seamen within the meaning of that word in s. 210 of the Merchant Shipping Act, 1894, the space required by that section had not been provided for them; but they contended that the Indian Acts, and not the English Acts, regulated the crew space provided for Lascars, and they prayed a declaration to that effect. The Attorney-General in his answer and plea admitted that the accommodation provided by the petitioners for Lascars in these ships fulfilled the requirements of the Indian Acts relating to the matter, but submitted that the provisions of the Merchant Shipping Act, 1894, relating to the accommodation of seamen governed the matter, and not those of the Indian Acts. (1)

(1) By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 210, "Every place in any British ship occupied by seamen or apprentices

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Sir R. T. Reid, K.C., and *Scrutton, K.C.*, for the petitioners. The sole question is whether the provisions of the Indian Acts relating to crew space have been superseded by the Merchant Shipping Act of 1894. The contention of the petitioners is that the regulations as to crew space contained in s. 210 of that Act have no application to Lascars at all. By 4 Geo. 4, c. 80, ss. 25 and 26, power was given to the Governor-General of Fort William in Bengal—afterwards the Governor-General of India—in Council to make regulations for the accommodation of Asiatic seamen, and those regulations were to have the force of law. In pursuance of that statute, an Indian Act of 1850 was passed, which made regulations in respect of Lascars serving on board British ships. That Act was repealed by the Indian Merchant Seamen Act of 1859 (1859, No. 1); but before then the Merchant Shipping Act, 1854, had been passed, which, by ss. 288 and 289, provided that the provisions of that Act as applied by the Governor-General of India in Council might be enforced throughout Her Majesty's dominions, and generally recognised the authority of the Governor-General of India to deal with the subject. That Act, however, contained no regulations as to crew space. Then in 1859 the Indian Merchant Seamen Act of 1859 was passed by the Governor-General of India in Council. It provided by s. 70 that "a place or places of shelter shall be provided below a well-caulked and substantial deck for the men engaged under this Act; such place or places shall be so arranged as to allow for the men the following spaces: (1.) For each European seaman . . . . nine superficial feet if the place be not less than six feet in height from deck to deck, or fifty-four cubic feet if the height from deck to deck be less than six feet; (2.) for each Lascar . . . . four superficial feet. . . ." That was the first time that crew space was provided for in any Act, either Imperial or Indian, and either for European sailors or Lascars. Next came the Merchant

and appropriated to their use shall have for each of those seamen or apprentices a space of not less than seventy-two cubic feet, and of not less than twelve superficial feet measured on the deck or floor of that place, and shall be subject to the regulations in the sixth schedule to this Act, and those regulations shall have effect as part of this section. . . ."

Shipping Act, 1867 (30 & 31 Vict. c. 124), which by s. 9 provided for crew space for seamen and apprentices on board British ships. That was the first provision regulating crew space in an Imperial statute. In 1876 the Indian Merchant Seamen Act, 1876 (1876, No. 13), was passed by the Governor-General of India in Council, which by s. 9 amended s. 70 of the Indian Act of 1859 by increasing the amount of crew space required to ten superficial feet and sixty cubic feet for European seamen, and to six superficial feet for Lascars respectively, the amount of crew space required for Lascars being, however, less in quantity than was required for seamen by s. 9 of the Merchant Shipping Act, 1867. The petitioners have acted for many years under the regulations of s. 9 of the Act of 1876, and have continued to provide for the Lascars serving on board their ships a more liberal amount of crew space than is required by that section. The Merchant Shipping Acts, 1854 and 1867, have been repealed by the Merchant Shipping Act, 1894, and it is now contended for the Crown that the provisions of s. 210 of that Act override the provisions of the Indian Act of 1876 and govern this case. But although the former Imperial Merchant Shipping Acts have been repealed, the Indian Acts which were made under their authority are not affected (Interpretation Act, 1889, s. 38), and the provisions of the Indian Acts as to crew space are therefore still in force.

The Merchant Shipping Act, 1894, does not relate to crew space for Lascars at all. Agreements with Lascars are treated of in s. 125, and by ss. 264 and 265, which are an almost exact reproduction of ss. 288 and 289 of the Merchant Shipping Act, 1854, the case is to be governed by the provisions on the subject contained in the Act only if there appears to be a conflict of laws. There is no conflict of laws here, but the provisions of s. 210 relating to crew space for seamen is qualified by the fact that Lascars are under the regulation of the Indian Acts. Can it be said that the Merchant Shipping Act, 1894, necessarily undid what had been lawfully done by the Indian Legislature under their permanent authority given by the Act of George IV., and the further authority given by

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the Merchant Shipping Act, 1854? If so, the provisions as to crew space contained in the Act of 1867 overrode the provisions of the Indian Act of 1859, and the Indian Act of 1876 was unlawful in so far as it dealt with crew space, since it was contrary to the Imperial enactment. From 1823 down to 1894 there has been no question but that Lascars were under the protection of the Indian Government; and this seems to be recognised by s. 125, sub-s. 5, of the Act of 1894, which shews a broad distinction between Lascars and ordinary seamen. The agreements with ordinary seamen are regulated by ss. 113 and 114 of that Act, under the approval of the Board of Trade; but the agreements with Lascars are by s. 125 to be under the direction of the Indian Government. By s. 260, s. 210 is only to apply conditionally—i.e., unless the context or subject-matter requires a different application; and the Lascars, as subject-matter of that section, do require a different application. They were always under the supervision of the Indian Government, and from 1859 to 1867 were in a better position than British seamen, since there was no provision until the Imperial Act of 1867 regulating crew space for the latter. Why should that Act take the Lascar out of the protection of the Indian Government merely because for the first time the British Legislature dealt with the question of crew space for seamen?

The Attorney-General (*Sir R. B. Finlay, K.C.*), with him the *Solicitor-General* (*Right Hon. Sir E. Carson K.C.*) and *H. Sutton*, for the Crown. These vessels were registered in the United Kingdom, and if the argument of the petitioners is carried to its logical extent the provisions of the Indian Acts would relate not only to Lascars, but also to European seamen, on vessels whether trading in Indian waters or anywhere on their voyage. The statute 4 Geo. 4, c. 80, has no relation to the present case, as the Indian Acts of 1859 and 1876 were not regulations made under that Act, but were legislative enactments made under the provisions of s. 288 of the Merchant Shipping Act, 1854. This is plain from the preamble to the Indian Act of 1859. No doubt that Act for the first time dealt with crew space for seamen, but it provided it for European seamen as well as for Lascars. The Indian Act of 1876

increased the crew space in both cases, but left it still less than is required by s. 210 of the Merchant Shipping Act, 1894. The Merchant Shipping Act, 1867, which is to be read with the Merchant Shipping Act, 1854, for the first time rendered it compulsory on the owner to provide crew space for seamen, and by s. 2 of the Act of 1854 "seamen" was defined as including "every person . . . . employed or engaged in any capacity on board any ship." That, therefore, would include Lascars, for no distinction was drawn between Lascars and European seamen. By s. 290 of the Act of 1854, if there was a conflict of laws in any matter relating to any ship or to any person belonging to any ship, the case was to be governed by the provisions of the Act relating to the matter. There was clearly a conflict of laws here, and, therefore, from 1867 the provisions of the Merchant Shipping Acts, and not of the Indian Acts, in regard to crew space ought to have prevailed.

Coming to the Merchant Shipping Act, 1894, the provisions of ss. 113 and 125 have nothing to do with this case. They relate to agreements only. Lascars are not taken out of the operation of s. 210 by s. 260, and ss. 264 and 265 clearly shew that under the circumstances the Imperial legislation prevails over the Indian legislation.

Sir R. T. Reid, K.C., replied.

Cur. adv. vult.

June 25. MATHEW J. This was a petition of right presented by the Peninsular and Oriental Steam Navigation Company under the following circumstances. The petitioners are owners of ships trading between England, Australia, and India, and among their ships are the *Australia*, trading between England and Australia, and the *Oriental*, trading between England and India.

The crews of those ships are composed of European seamen and of a class of British subjects, natives of India, who are known as Lascars. The agreements with the Lascars are entered into in British India, and are in accordance with s. 125 of the Merchant Shipping Act, 1894. The petitioners sought

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for a declaration that the crew space provided for the Lascars in their ships was regulated by the Indian Act of 1876 (amending the Indian Act, 1859), with which they alleged they had complied, while it was contended for the Crown that the subject-matter was regulated by s. 210 of the Merchant Shipping Act, 1894. These ships were registered in the United Kingdom in accordance with the provisions of the Merchant Shipping Act, 1854, and the statutes amending the same.

The first statute to which my attention was called was 4 Geo. 4, c. 80, s. 25. By that Act, which threw open trade between the British possessions and India, the Governor-General of Fort William in Bengal in Council was required as soon as might be to make, ordain, and publish rules and regulations to be observed by masters and owners of ships "trading under the authority of this Act." Ships "trading under the authority of this Act" were ships trading between any of the British possessions and India "the crews of which ships or vessels shall be wholly or in part composed of Asiatic sailors," and the rules and regulations were to be made "for the due supply of provisions, clothing, and other necessary accommodation" for such sailors. Sect. 26 provided that "all such rules and regulations until they shall be repealed or altered shall be observed and performed according to the true intent and meaning thereof, in like manner as if they had been herein inserted and had formed part of this Act."

It was contended for the petitioners that the Governor-General was given absolute power under that statute for the time being to exercise an exclusive jurisdiction for the protection of Lascars.

It was provided, as I have said, that if any regulations were made by the Governor-General they were to have statutory operation; but it could not be disputed that if any such regulations were made Parliament would have the power to modify and alter them. The argument for the petitioners was that that Act authorized the subsequent Indian legislation on the subject of crew space for Lascars, and that those subsequent Acts were founded on the authority given by that statute, and that an independent code of regulations was contemplated in

consequence for Lascars as distinguished from other seamen. I am satisfied that the Indian legislation on the subject did not spring from this statute, and that the Act of George IV. had no relation to the Indian Acts, but that they are founded upon the authority of the Merchant Shipping Act, 1854. Turning to that Act, it is clear in the first place that it applied in terms to such ships as the petitioners' and to their crews, and the definition of seamen which is given in that Act included all persons employed in any capacity on board any ships within the meaning of the Act. No distinction was drawn between Lascars and European seamen, and there seems to be no reason why any such distinction should be made. The statute contained various provisions in Part III. as to the crews of the ships referred to in the statute. There was no provision in the Act as to the spaces to be appropriated to any of the crew, and in the third part of the Act the only provision which had any reference to the accommodation of the crew was that contained in s. 231, and that appears to be confined to sleeping accommodation only. The statute contained two important sections. By s. 288 it was provided that "if the Governor-General of India in Council, or the respective legislative authorities in any British possession abroad, by any Acts, ordinances, or other appropriate legal means, apply or adapt any of the provisions in the third part of this Act contained to any British ships registered at, trading with, or being at any place within their respective jurisdictions, and to the owners, masters, mates, and crews thereof, such provisions, when so applied and adapted as aforesaid and as long as they remain in force, shall, in respect of the ships and persons to which the same are applied, be enforced" in the manner there provided. Sect. 290 went on to provide that, "If in any matter relating to any ship or to any person belonging to any ship there appears to be a conflict of laws, then, if there is in the third part of this Act any provision on the subject which is hereby expressly made to extend to such ship, the case shall be governed by such provisions; and if there is no such provision, the case shall be governed by the law of the place in which such ship is registered." Now, the effect of that appears to be perfectly

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plain. Any legislation in India or elsewhere as described in the section is kept under the control of the Imperial Parliament. Where the law of the ship is in conflict with any ordinance made by the Governor-General in India, the law of the ship is to prevail. That statute having been passed, the first Indian Act which relates to this matter was passed by the Governor-General of India in Council in the year 1859. That Act, as appears from the preamble, was clearly passed under the powers conferred by s. 288 of the Act of 1854. The Indian Act provided for the first time, and very imperfectly, for spaces to be appropriated to the sailors on board, and s. 70 contained these provisions: "A place or places of shelter shall be provided below a well-caulked and substantial deck for the men engaged under this Act: such place or places shall be so arranged as to allow for the men the following space," and then for each European seaman a provision was made, and for the Lascars in the same way a very scanty provision was also made. That statute was acted upon, and, I am told, continued to be acted upon down to the passing of the amending Act in the year 1876. Meanwhile, by the Merchant Shipping Amendment Act, 1867, further provision was made for spaces to be appropriated to the sailors on board such ships as these. I need not refer to the provisions of that statute, because they have been repealed and are repeated with certain additions by s. 210 of the Merchant Shipping Act, 1894. That section makes provision as to the spaces to be appropriated to the members of the crew.

Now, when that Act passed, there can be no question that the Indian Act was in conflict with the Imperial Act. The provision made by the one in respect of crew space, scanty and inadequate as it certainly was, was entirely set aside and better accommodation provided under the provisions of the Act of 1894. Under those circumstances, it appears to me to be clear that in the conflict the Imperial Act must prevail. Sect. 265 of the Act of 1894 repeated the provisions of s. 288 of the Act of 1854. It preserved, therefore, the enactment that in case of conflict the Imperial Act should prevail. I ought to add that after the Indian Act of 1859, and after the Merchant

Shipping Act of 1867 had been passed, an amending Act was passed by the Indian Legislature, and the provisions of that Act did expand and did extend to some extent the provisions of the earlier Act, but left the British seaman and the native alike in a much worse position than they would have been under Imperial legislation.

Now, how was this contention on the part of the Crown, which appears to me to be right, sought to be met on the part of the petitioner? The argument was an extremely subtle one, but it appears to me to be entirely untenable. The argument really comes to this—that the Act of George IV. initiated a series of provisions confined to Lascars, and that they were therefore intended to be dealt with by independent legislation, and that where the word "seaman" occurred in an Imperial Act in pari materia the words "except Lascars" must be inserted. I see no ground whatever for any such contention. As I have said, it appears to me that the Act of George IV. was not the source of the subsequent Indian statutes, and that they had a different origin. I see no indication whatever of any intention that a separate and exclusive system of legislation should be maintained with respect to the Lascars who constitute part of these crews. But the object of the argument, of course, was to make out that the legislation by the Indian Acts and by the Imperial Act were not in conflict, but ran parallel to each other. As I said, I see no ground whatever for any such suggestion. Attention was called to one section of the Act of 1894—s. 260—and, if I follow the argument correctly, what was attempted to be made out was this: that section related to the application of Part II. of the Act, which referred to the crews among other matters, and provided—"This part of this Act shall, unless the context or subject-matter requires a different application, apply to all seagoing ships registered in the United Kingdom, and to the owners, masters, and crews of such ships." Now it was said the crews of the ships, where they consisted of Lascars and Europeans, required an application according to the subject-matter. The subject-matter was partly, therefore, Lascars, and the interpretation of that section pointed to the interpretation

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contended for by the petitioners—that there was intended to be separate legislation starting with the Act of George IV., and that the section recognised the existence of that intention. Again it seems to me to be impossible to act upon any such far-fetched argument. The case appears to me to be a perfectly plain one. It follows that the Crown is entitled to the declaration asked for; that the petitioners since 1867 have been and are now bound to appropriate to the use of the Lascars the accommodation for seamen specified in s. 210 of the Act of 1894, and the 6th schedule as part of that section; further, that by s. 265 of the Act of 1894 the provisions of that Act relating to the accommodation for seamen must govern that matter, and not those of the Indian Acts. That was the one point which was discussed before me, and which it was arranged should be disposed of in the first instance; and on that point my judgment is in favour of the Crown.

Judgment for the Crown.

Solicitors for petitioners: *Freshfields.*
Solicitor for the Crown: *Solicitor for Board of Trade.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

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July 19, 20.

FARQUHARSON BROTHERS & CO. *v.* KING & CO.

Sale of Goods—Estoppel—Loss to One of Two Innocent Persons through Fraud of a Third Person—Conduct conducing to the Fraud—Power of Disposition of Goods given to a Clerk.

The plaintiffs, who were timber merchants, kept stocks of timber warehoused in the name of their firm with a dock company. For the purposes of their business they instructed the dock company to accept all transfer or delivery orders in respect of the timber signed by a confidential clerk in their employ; and they authorized the clerk to give such orders for the purpose of carrying out sales of timber made to their customers. From time to time during a period of four years the clerk under an assumed name fraudulently sold to the defendants timber belonging to the plaintiffs, carrying out the sales so made by giving to the dock company orders for the transfer of timber into his assumed name, and then in that name giving delivery orders for the timber to the defendants. The defendants bought the timber and paid the clerk for it in good faith, and without suspicion of any fraud. The plaintiffs having sued the defendants to recover the timber so delivered to them or its value:—

Held (by A. L. Smith M.R. and Vaughan Williams L.J., Stirling L.J. dissenting), that the case came within the rule that, where one of two innocent persons must suffer loss through the acts of a third person, he, who has enabled the third person to occasion the loss, must sustain it; that the plaintiffs by their conduct had enabled the clerk to hold himself out to the defendants as entitled to dispose of the timber, and were therefore estopped from disputing his title to do so; and that the action was consequently not maintainable.

Application by the defendants for judgment or a new trial in an action tried by Mathew J. with a jury in the Commercial Court.

The action was for the wrongful detention, or, alternatively, for the wrongful conversion, of forty-five different parcels of timber specified in particulars given by the statement of claim, the total value of which amounted to 1200*l.*

The plaintiffs were timber merchants, and the defendants were packing-case manufacturers. The plaintiffs were in the habit of warehousing large quantities of timber imported by them in the Surrey Commercial Docks. They had in their employ a confidential clerk named Capon. On January 25,

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1895, they sent to the secretary of the dock company a letter as follows: "Dear Sir,—We have made arrangements whereby in future Mr. Capon will sign delivery orders on behalf of, and in addition to, the other members of the firm, and inclose our written authority for same. Yours truly, Farquharson Brothers & Co." Inclosed in the letter was the following authority: "We hereby authorize you to accept all transfer or delivery orders, which shall be signed on our behalf by Mr. H. J. Capon, whose signature is subjoined: the company acting also on our signature as heretofore. This authority is to remain in force until expressly revoked in writing by us. (Signed) Farquharson Brothers & Co."

The plaintiffs carried on business at an office in the City, but the members of the firm were often away on business; and, during their absence, Capon dealt with the correspondence, and had the general direction of business at the office. He had authority to sell timber on behalf of the plaintiffs' firm at current prices to regular customers of the firm, provided the quantity sold was not exceptionally large; and, in order to carry out such sales, and sales made by the travellers for the firm, he had authority to sign transfer and delivery orders in respect of timber at the docks. In January, 1896, Capon commenced a series of frauds with regard to timber belonging to the plaintiffs which was continued down to February, 1900. The nature of the frauds committed by him was as follows: He secured an address in Battersea, from which he from time to time corresponded with the defendants, who were not regular customers of the plaintiffs, under the assumed name of Brown, representing himself as being a general commission agent in the timber trade, and as being empowered to sell on commission for principals (not the plaintiffs) small lots of timber called in the trade "throw-outs." He thus from time to time effected sales from himself, under the name of Brown, to the defendants of the various quantities of timber mentioned in the particulars annexed to the statement of claim, which sales he carried out by giving to the dock company orders for the transfer of timber standing in the plaintiffs' name into the name of Brown, and, after the transfer had been made, giving

the defendants delivery orders for the timber under that name. The defendants purchased the timber for which they duly paid Capon, under the name of Brown, in good faith and without suspicion of any fraud. The learned judge at the trial left to the jury the question whether the plaintiffs had so acted as to hold Capon out to the defendants as their agent to sell the timber to the defendants. The counsel for the defendants asked him also to leave to the jury the question whether the plaintiffs had by their conduct enabled Capon to hold himself out as the true owner or as entitled to dispose of the goods, but he refused to leave that question to the jury. The jury answered the question left to them in the negative, and the learned judge thereupon gave judgment for the plaintiffs for the value of the timber in respect of which the action was brought. It was agreed by the counsel for the parties in the Court of Appeal that, after determining whether the learned judge ought to have left any other question to the jury than that which he did leave to them, and, if so, what other question he should have left, the Court should determine for which of the parties, upon the facts proved at the trial, judgment should be entered without sending the case down for a new trial.

July 19, 20. *Lawson Walton, K.C.*, and *Cababé*, for the defendants. The question left by the learned judge to the jury does not dispose of the case, and was not the right question under the circumstances to leave to them. It is a principle of law established by many decisions, and which is applicable to the present case, that, where one of two innocent persons must suffer through the fraud of a third person, he whose conduct has enabled the third person to commit the fraud must bear the loss. It may be admitted that there is no evidence that the plaintiffs held out Capon as their agent to sell the timber to the defendants, but the learned judge should have left to the jury the question whether the plaintiffs did not by their conduct enable Capon to hold himself out as owner of, or as able to give a good title to, the timber which he sold to the defendants. It is submitted that, upon the facts proved at the trial, the answer to that question must be in the affirmative. The plaintiffs for their

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own convenience put Capon in a position to commit the frauds which he committed, by giving him an unlimited power of signing orders for the transfer or delivery of timber to any person in whose favour he chose to sign such an order. By the manner in which the plaintiffs conducted their business they enabled Capon to assume the position of being entitled to deal with the timber which he sold to the defendants. Unlimited confidence appears to have been reposed in him. He was allowed to have the general supervision of the staff of clerks, and was enabled to manipulate the books, apparently without check or supervision, so that during a period of four years his frauds remained undetected. Under these circumstances the plaintiffs are estopped from disputing his title to sell the timber which he sold to the defendants: see *Ramazotti* v. *Bowring* (1); *Pickering* v. *Busk*. (2) This case falls within the observations of Lord Halsbury L.C. in the recent case of *Henderson & Co.* v. *Williams*. (3)

[They also cited *Kingsford* v. *Merry* (4); *Brocklesby* v. *Temperance Permanent Building Society*. (5)]

Joseph Walton, *K.C.*, and *W. Whately*, for the plaintiffs. It is clear from the authorities that some limitation must be put upon the broad proposition that, where one of two innocent persons must suffer the loss occasioned by the fraud of a third person, he whose conduct gave the opportunity to the third person to commit the fraud must suffer the loss: see *Scholfield* v. *Earl of Londesborough*. (6) There is no such doctrine in the law of England as that, wherever the negligence of an owner of property has led to the commission of a theft, as between him and an innocent purchaser from the thief, he is estopped from disputing the title of the thief to dispose of the property. If a man leaves his hall door open, or gives the key of his box to a person to take care of, he may, no doubt, thereby allow his property to be stolen, but he does not in consequence lose his right to assert his title as against an innocent pur-

(1) (1860) 7 C. B. (N.S.) 851.
(2) (1812) 15 East, 38; 13 R. R. 364.
(3) [1895] 1 Q. B. 521.
(4) (1856) 1 H. & N. 503.
(5) [1895] A. C. 173.
(6) [1895] 1 Q. B. 536; [1896] A. C. 514.

chaser from the thief: see *Bechuanaland Exploration Co.* v. *London Trading Bank* (1); *Cole* v. *North Western Bank.* (2) Mere negligence in the care of property cannot, in the absence of any holding out of the fraudulent person as entitled to dispose of it, operate as an estoppel. In *Henderson & Co.* v. *Williams* (3) the defendant, the warehouseman, had clearly attorned to the plaintiffs, and the true owners of the goods had invested Fletcher, the person guilty of the fraud, with full power of disposing of the particular goods in question as if he were the true owner thereof. The majority of the Court in that case decided in favour of the plaintiffs on the ground that the defendant had attorned to them, but Lord Halsbury, no doubt, went further, and decided the case on the ground that the true owners of the goods had given Fletcher full power to dispose of the goods. He put the case as one in which the person guilty of the fraud was held out by the true owners as being entitled to dispose of the goods as owner. It is submitted that there was not in the present case any holding out by the plaintiffs of Capon as the true owner of, or as entitled to deal with, the timber. It is essential in order to create the estoppel relied on that there should be such a holding out. In order that the proposition may apply that, where one of two innocent persons has to suffer through the acts of a third person, he whose conduct has enabled the third person to cause the loss must suffer, the conduct relied upon must have been the proximate cause of the loss. No doubt the instruction given by the plaintiffs in this case to the dock company was a causa sine quâ non, and without it the fraud could not have been committed; but it cannot be considered that the fraud which Capon committed was a natural consequence of the giving by the plaintiffs of that instruction, or one which the plaintiffs were bound to contemplate. By reason of that instruction to the dock company Capon was really enabled to steal the timber, but that does not deprive the pliantiffs of their right to assert their title to the timber against the defendants, any more than any other piece of carelessness which has conduced

(1) [1898] 2 Q. B. 658. (2) (1875) L. R. 10 C. P. 354.
(3) [1895] 1 Q. B. 521.

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to the stealing of goods prevents the true owner of them from asserting his title against a bonâ fide purchaser for value. The case does not stand on the same footing as if Capon had given delivery orders direct to the defendants. He first of all procured the transfer of the timber into the name of Brown, which is substantially as if, by virtue of the opportunity given him by the instruction to the dock company, he had himself fraudulently obtained delivery of the goods, and thus in fact stolen them, and afterwards had sold them to the defendants, in which case it could not be contended that the rightful owners could not assert their title. The case cannot at the utmost be put any higher than as standing on the same footing as if for business purposes the plaintiffs had allowed Capon to have possession of the goods themselves for the purpose of dealing with them in accordance with the authority given to him. But, apart from statute, intrusting a person with possession of goods, or the indicia of title to goods, does not per se constitute a holding of him out as entitled to dispose of them. If the contention for the defendants is correct, it would not have been necessary to pass the Factors Acts, because the common law would have been sufficient in cases within the Acts to protect a bonâ fide purchaser for value. But here, in truth, Capon was not intrusted with the goods themselves, or with any indicia of title to them, by virtue of possession of which he was held out as owner of the goods. He was merely intrusted with a general authority to sign transfer and delivery orders for certain purposes, by abusing which he was enabled to steal the goods. But the intrusting him with such an authority cannot be considered as the proximate cause of his committing a fraud. In *Lamb* v. *Attenborough* (1), in which the facts were almost exactly similar to those of the present case, it was held that a clerk, who had been intrusted with dock warrants, was not an agent within the meaning of the Factors Acts (6 Geo. 4, c. 94, and 5 & 6 Vict. c. 39). It is submitted that the Factors Acts constitute what may be called the high-water mark with regard to the question, under what circumstances the intrusting of a person with goods, or the

(1) (1862) 1 B. & S. 831.

indicia of title to goods, in cases of this kind, operates to estop the person so intrusting from denying the right of the person intrusted to deal with the goods. It would be an extraordinary result, if such a case as was held not to be within the Factors Acts in *Lamb* v. *Attenborough* (1) were covered by the common law. If Capon had given a transfer or delivery order direct to the defendants, the case would have been different, because the defendants would in that case have got his signature to the order as representing the plaintiffs' firm, but the orders for transfer were not given to the defendants. Capon first fraudulently got the timber transferred into his own name—in other words, he stole it from the plaintiffs; and the case therefore stands merely on the footing of goods stolen from their owner through his carelessness in taking charge of them. It was held in *Johnson* v. *Credit Lyonnais Co.* (2) that negligence on the part of the owner of goods with regard to their custody does not estop him from asserting his title to them, because he has no legal duty towards a possible bonâ fide purchaser from the thief who steals the goods. The cases of the *Mayor, &c., of the Merchants of the Staple of England* v. *Bank of England* (3) and *Bank of Ireland* v. *Trustees of Evans' Charities* (4) shew that the intrusting of Capon with a general authority to sign transfer and delivery orders for the purposes of the business of the plaintiffs' firm cannot be regarded as the proximate cause of the loss which has been occasioned. To lay a foundation for the case put forward on the part of the defendants, there must either be an intrusting with the goods themselves or the indicia of title to them, or a holding out of the person committing the fraud to the innocent purchaser as entitled to deal with the goods. The mere fact that a general authority is given for the purposes of business to sign transfer or delivery orders, which authority is abused by the person to whom it is given, is not sufficient.

[They also cited *Cundy* v. *Lindsay*. (5)]

Lawson Walton, K.C., for the defendants, in reply. The

(1) 1 B. & S. 831.
(2) (1877) 3 C. P. D. 32.
(3) (1887) 21 Q. B. D. 160.
(4) (1855) 5 H. L. C. 389.
(5) (1878) 3 App. Cas. 459.

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only limitation upon the general rule that, where one of two innocent persons must suffer through the acts of a third person, he whose conduct has enabled the third person to occasion the loss must sustain it, really suggested on the part of the plaintiffs is that the loss must not be too remote a consequence of the conduct relied upon. It may be admitted that the authorities shew that some such limitation must be imposed on the rule, but they also clearly shew that the present case comes within the rule and not within any exception to which it may be subject. If the present case is not within the rule, it is difficult to understand how any case can come within it. In the present case Capon was intrusted by the plaintiffs with all the powers which they themselves could exercise over the timber at the docks for their convenience, in order that he might exercise those powers for the purposes of their business. He was empowered to pass the property in the timber and give possession of it to whomsoever he chose. The power so given to him was the proximate cause of his being able to commit the frauds which he committed. The case stands on an entirely different footing from cases like the *Mayor, &c., of the Merchants of the Staple of England* v. *Bank of England* (1), where something is intrusted to a person merely for safe custody, and it is not intended that he should employ it for any purpose. If it is correct to say that, wherever a fraud intervenes, it is too remote a consequence of intrusting the person guilty of it with control over goods, or the indicia of title to them, to render the person so intrusting the control liable to bear the loss occasioned by the fraud, practically speaking, the well-known doctrine that, where one of two innocent persons has enabled a third person to occasion loss, he must sustain it, may as well be struck out of the law of England. The doctrine clearly contemplates the deception of one of two innocent persons by a fraud which the other never contemplated, but has by his indiscretion enabled a third person to commit. It is sought on the part of the plaintiffs to narrow the application of the before-mentioned doctrine to cases where goods, or the indicia of title to them, have been

(1) 21 Q. B. D. 160.

intrusted to persons, so as to hold them out as having power to dispose of the goods. But, in the case of large quantities of heavy goods, the goods are generally in the possession of wharfingers, or warehousemen, and the substantial question for the purpose of cases such as this is, not who has been allowed to be in the apparent possession of the goods, but who has been allowed to have apparent dominion over them, by the true owner. [He also cited *Dyer* v. *Pearson* (1); *Vickers* v. *Hertz*. (2)]

A. L. SMITH M.R. This is an application for judgment or a new trial in an action of detinue tried before Mathew J. in the Commercial Court. The learned judge left one question to the jury, and, that question being answered adversely to the defendants, a verdict passed for the plaintiffs for 1200*l*. The defendants contend that they are entitled to a new trial on the ground of misdirection by the learned judge in not leaving the right question to the jury; and it has been agreed between the counsel for the parties, as I understand, that this Court should not only determine whether the right question was left to the jury, and, if not, what question ought to have been left to them, but should proceed to determine, upon the facts proved in evidence at the trial, what answer ought to be given to any question which should have been left to the jury, and for which side therefore judgment should be entered.

The action is for detinue of a number of small lots of timber specified in a schedule of particulars appended to the statement of claim, which have been received by the defendants from time to time during a period of about four years, and the total value of which is 1200*l*. The plaintiffs are importers of timber, who carry on business at an office in the City, and they are accustomed to store the timber imported by them at the Surrey Commercial Docks, the timber being delivered by the dock company upon their orders as required to their customers. On January 25, 1895, they had in their employ a clerk named Capon, who has been called a confidential clerk, but who unfortunately turned out to be a rogue; and on that date they sent

(1) (1824) 3 B. & C. 38; 27 R. R. 286. (2) (1871) L. R. 2 H. L., Sc. 113.

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to the dock company a document, which in my opinion plays an all-important part in this case. By that document they authorized the dock company to accept all transfer or delivery orders which should be signed on their behalf by Capon; and the document was sent to the dock company in a letter, which stated that the plaintiffs had made arrangements whereby in future Capon would sign delivery orders on behalf of and in addition to the other members of the firm. Nothing could be wider than the authority given by these documents, by which in effect carte-blanche was given to Capon to sign orders for the transfer of the plaintiffs' timber into any name, or for delivery of it to any person, without any limitation whatever. I should have thought that any business man would have thought twice before he gave to a clerk this unlimited power over the whole of the timber belonging to the firm. It has been pointed out by my brother Vaughan Williams in the course of the argument that it is impossible, in the case of such an article as timber stored in the docks, to deliver the article itself into the possession of a clerk or any one else; but an authority can be given by which at any time a person can go to the docks and get possession of the timber, and this was what was in effect given by the plaintiffs to Capon, by instructing the dock company to accept any orders for the transfer or delivery of timber signed by him without any limitation. Soon after Capon was armed with this power, he commenced to commit a series of frauds, whereby he cheated his employers as well as the defendants. What in substance he did was by means of orders signed by him to obtain possession of a number of small lots of timber belonging to his employers at the docks, and sell them to the defendants. It is admitted that the defendants purchased the timber in good faith, believing that their vendor was entitled to sell it to them. It may be inferred that they purchased the timber in the ordinary course of their business, which was that of packing-case makers, but, however that may have been, it is conceded by the plaintiffs that they purchased the timber honestly. They bought the timber from Capon, under the assumed name of Brown, in small parcels from time to time during a period which, as I have said,

extended over about four years; and Capon, who by transfer orders signed by him had procured the transfer of the timber into the name of Brown at the docks, gave delivery orders under that name for the delivery of the timber to the defendants, who paid for the same. The plaintiffs now sue the defendants on the ground that they have during all this period of four years been wrongfully detaining timber belonging to the plaintiffs. The defendants set up by way of defence that, inasmuch as they honestly purchased from Capon, whom the plaintiffs had themselves armed with power to give delivery orders for the timber, the plaintiffs cannot be heard to say that they have wrongfully detained the timber. The learned judge at the trial, though pressed to do so, refused to leave any other question to the jury than the question whether the plaintiffs had so acted as by their conduct to have held out Capon to the defendants as the plaintiffs' agent to sell the goods to the defendants. It seems to me clear that on the facts proved that question could only be answered as the jury answered it, namely, in the negative. The defendants' counsel asked the learned judge to put another question to the jury, but he refused to do so. The result was that, as I have said, the judgment was for the plaintiffs, and, if that judgment stands, the defendants will have to pay over again for the timber, for which they have in good faith already paid Capon.

Now the first point is whether the question which the learned judge put to the jury is the only question which ought to have been put to them. I think not. I think that the question which, upon the facts of this case, ought to have been put is, Did the plaintiffs by their conduct enable Capon to hold himself out as the owner of the timber, or as entitled to dispose of it? That being the question which, in my opinion, ought to have been put, the next question is, How, upon the facts proved in this case, ought it to be answered? For my part I have no doubt that it ought to be answered in the affirmative, and that the judgment therefore ought to be for the defendants. I think that the result of the argument which has been addressed to us for the plaintiffs in this case would be practically to strike out of the law of England the

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well-known principle with relation to cases where the question is, which of two innocent persons must bear the loss occasioned by the fraud of a third person. This Court acted upon that principle in *Nash* v. *De Freville*. (1) I will read the proposition I stated in that case, which was really that stated in the dictum of Ashhurst J. in *Lickbarrow* v. *Mason* (2), and which I think to be in substance good law, subject to certain limitations. "It is a well-known principle of law that, whenever one of two innocent persons must suffer by the acts of a third person, he who has enabled such third person to occasion the loss must sustain it." I think that these words are substantially a sound expression of the law, subject to the qualification that the act which is relied upon as having enabled the third person to occasion the loss must, no doubt, be an act so far connected with the fraud which has caused the loss that it may reasonably be looked upon as bringing about that fraud. I think that, if one of the two innocent persons has done such an act, he must bear the loss thereby occasioned, and not the other person who has done nothing which led to the fraud being committed.

Now, applying the principle which I have mentioned to the facts proved here, how does the case stand? By the document of January 25, 1895, to which I have referred, plenary authority was given by the plaintiffs to the dock company to accept any transfer or delivery orders for timber signed by Capon. A good deal was made in argument of the fact that Capon did not directly give to the defendants delivery orders for the timber signed by him in his own name, but signed intermediate orders for the transfer of the timber into the name of Brown. It seems to me that that fact is not material to the substance of the case. The reason why Capon did this was no doubt to prevent his name appearing in the transactions with the defendants. Having regard to the facts of this case, can it be said that the plaintiffs did not by their conduct enable Capon to hold himself out as the owner of the goods or as entitled to dispose of them, and so enable him to commit the fraud, and occasion the loss, the consequences of

(1) [1900] 2 Q. B. 72. (2) (1787) 2 T. R. 63; 1 R. R. 425.

which they are seeking now to throw upon the defendants? I do not see how it can be denied that the document sent by the plaintiffs to the dock company on January 25, 1895, directly enabled Capon to give the transfer and delivery orders by means of which he committed the fraud which has occasioned the loss in this case. I desire to point out that the result of the argument that, because the fraud of Capon was the proximate cause of the loss, the plaintiffs are not liable to bear the loss would really be to strike out of the law of England the principle to which I have alluded, for in these cases fraud is always the proximate cause of the loss. In support of the conclusion at which I have arrived in this case, I would refer to what was said by Lord Hatherley L.C. in the House of Lords in *Vickers* v. *Hertz*. (1) He there said: "When, however, one person arms another with a symbol of property he should be the sufferer, and not the person who gives credit to the operation, and is misled by it." Again, in *Henderson & Co.* v. *Williams* (2), Lord Halsbury L.C., sitting in the Court of Appeal, said: "I think that it is not undesirable to refer to an American authority—which, I observe, was quoted in the case of *Kingsford* v. *Merry* (3)—*Root* v. *French* (4), in which, in the Supreme Court of New York, Savage C.J. makes observations which seem to me to be well worthy of consideration. Speaking of a bonâ fide purchaser who has purchased property from a fraudulent vendee and given value for it, he says: 'He is protected in doing so upon the principle just stated, that, when one of two innocent persons must suffer from the fraud of a third, he shall suffer who, by his indiscretion, has enabled such third person to commit the fraud. A contrary principle would endanger the security of commercial transactions, and destroy that confidence upon which what is called the usual course of trade materially rests.'" For the reasons which I have given I think that the question which I have already stated ought to have been left to the jury, and that the answer to it ought to be in the affirmative. The result is that judgment should be entered for the defendants.

(1) L. R. 2 H. L., Sc. 113.
(2) [1895] 1 Q. B. 521.
(3) 1 H. & N. 503.
(4) 13 Wend. 570.

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VAUGHAN WILLIAMS L.J. I agree. I think that this is a difficult case, in which one ought to endeavour to draw with some precision the line between the authorities on the one side and the other. I think that I shall best effect that object by stating first what I understand to be the facts of the case, and then dealing with the legal position resulting from those facts. In this case the plaintiffs, who kept large stocks of timber at the Surrey Commercial Docks, gave on January 25, 1895, to the dock company authority to accept all transfer and delivery orders signed by their confidential clerk, Capon, on behalf of the firm, just as if his signature was that of one of the members of the firm. Capon fraudulently executed orders for the transfer of parcels of timber belonging to the plaintiffs, which were lying at the docks in the name of the plaintiffs' firm, into the name of Brown. This was done by him for the purpose of carrying out sales of timber, which he from time to time fraudulently made to the defendants, and in respect of which he gave to the defendants delivery orders signed by him in the name of Brown, into which he had fraudulently transferred the timber of his employers as before mentioned. The defendants in good faith, and without suspicion of any fraud, paid Capon for the timber in the name of Brown, and received the timber from the dock company by virtue of the delivery orders given to them by Capon. These are the facts so far as they appear to me to be material. What then is the legal position resulting from them? It seems to me that the plaintiffs in effect intrusted Capon with the power of transferring the timber standing in the name of the plaintiffs' firm at the docks into any other name he chose. He was only authorized, no doubt, to sign transfer or delivery orders for the purpose of carrying out sales effected by the firm, or sales which he himself might effect as their agent in pursuance of a limited authority given to him for that purpose; and it was of course contrary to the authority given to him that he should exercise the power of giving transfer or delivery orders for the purpose of carrying out sales effected by him in fraud of his employers in the name of Brown. It must be observed, however, that transfer and delivery orders so given by him in fraud of his

employers did in some sense bind them, for it is clear that they could not have questioned the right of the dock company to transfer timber into any name into which they were directed to transfer it, or to deliver it to any person to whom they were directed to deliver it, by an order signed by Capon. The effect therefore of the giving by the plaintiffs of the authority which they gave to the dock company was that they for their own convenience in the conduct of their business intrusted Capon with power to transfer the timber into names other than that of the plaintiffs' firm, and so enabled him to sell or otherwise deal commercially with the timber so transferred; that is to say, they enabled Capon to commit that fraud which must in the result cause loss to one or other of two innocent parties. He, no doubt, abused the power intrusted to him by exercising it contrary to the authority given to him; but it is important to remember that the power was conferred upon him for the purpose of enabling him to carry out sales of timber; not, it is true, such sales as he did in the result carry out, but still for the purpose of carrying out sales. The plaintiffs therefore did something more than place property in the custody or under the charge of Capon; for they intended that he should have the power which he had for the purpose of carrying out sales of the timber. So the case is analogous, not to the case suggested of merely giving the key of a box in which property is to a person for custody, but to a case where the person intrusted with the key of a box is intended to deal under certain circumstances with the property in the box. I think that this observation which I am making will be found to be of some importance when one comes to ask oneself the question whether or not this case falls within the principle of the decision in *Johnson* v. *Credit Lyonnais Co.* (1)

I wish to state shortly the principle upon which I have come to the same conclusion in this case as the Master of the Rolls. There is no doubt the general principle to which he has called attention, namely, that enunciated by Ashhurst J. in *Lickbarrow* v. *Mason* (2), to the effect that "Wherever one of two innocent persons must suffer by the acts of a third, he who has

(1) 3 C. P. D. 32. (2) 2 T. R. 63; 1 R. R. 425.

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enabled such third person to occasion the loss must sustain it." Speaking for myself, I must say that, notwithstanding the passage in the judgment of Lord Halsbury L.C. in *Henderson & Co.* v. *Williams* (1), to which attention has been called, affirming the principle laid down in the terms which I have quoted, I think that it is impossible, having regard to the authorities, to affirm that principle in the very wide terms in which it is expressed. I think that it is impossible, in the face of various authorities on the subject, to say that, in every case in which the act of one of two innocent persons has enabled a third person to occasion loss, the first-mentioned person must sustain the loss. Take for instance the case of *Johnson* v. *Credit Lyonnais Co.* (2) There the purchaser of tobacco, lying in a warehouse in the name of the vendor, allowed the tobacco after the sale to remain in the name of the vendor, who was thereby enabled to pledge the tobacco. There can be no doubt that in a sense, and a very effective sense, what enabled the fraudulent vendor to occasion the loss was the fact that the purchaser did not choose to remove the tobacco purchased by him or to have it transferred into his name. The Court were of opinion that, though in a sense the conduct of the purchaser in leaving the tobacco standing in the name of the vendor had enabled him to commit the fraud, and thus occasioned the loss, yet the purchaser was entitled to the tobacco, and the loss must be borne by the person to whom the fraudulent vendor had pledged it. It is clear from that case that there must be some limitation to the principle to which I have alluded. Then what is that limitation? It has been stated in various ways. Sometimes it has been said that the conduct relied on as the basis of the estoppel must be directly connected with the transaction, so as to be the proximate cause of the loss, and again in other cases it has been said that the conduct relied on must have been the effective or proximate cause of the loss; but, in whatever way the limitation ought to be expressed, there is abundance of authority to shew that it is necessary to qualify in some way or other the general terms of the dictum of Ashhurst J., which was approved of by

(1) [1895] 1 Q. B. 521. (2) 3 C. P. D. 32.

Lord Halsbury L.C. in *Henderson & Co.* v. *Williams* (1), and by the American judge Savage C.J. in the case cited by him. The conclusion at which I have arrived in relation to the matter is that it never ought to be said that a person has within the meaning of the rule in question done an act which enabled the third person to commit a fraud or occasion a loss, unless the act relied on was one which was intended by the doer of it to be acted upon by somebody. Let me illustrate my meaning by reference to a case like that of *Brocklesby* v. *Temperance Permanent Building Society*. (2) Suppose that in that case the father had merely intrusted the son with the title-deeds of property to take care of, and the son had then fraudulently raised money upon them; could it have been said that the case came within the principle under discussion? I think not, because the father would have done no act which he intended to be acted on by the son. He would have merely handed the deeds to his son to be taken care of; and it seems to me that, though it might be the case that the son was only enabled to commit the fraud by reason of the father having intrusted the deeds to him, it could not be said that the father had enabled the son to occasion the loss within the meaning of the principle in question, because the father never intended the son to deal with the deeds in any way. In that case as it actually came before the Court, the father had not merely handed the deeds to the son to take care of, but had intrusted them to him with the intention that he should do what he did in fact do, namely, raise money upon them. It is true that, in so doing, the son departed from the authority which had been given to him; but it was held that, as the father had intrusted the deeds to his son for the purpose of doing what he did do, namely, of raising money upon them, the father could not recover the deeds without paying the money advanced upon them, although the son had departed from the terms of the authority given to him. Take again the case of *Johnson* v. *Credit Lyonnais Co.* (3) It is clear that it was impossible in that case to say that the purchaser of the tobacco left it standing

(1) [1895] 1 Q. B. 521. (2) [1895] A. C. 173.
(3) 3 C. P. D. 32.

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in the vendor's name in order that the vendor might as his agent do anything with it. He left it where it was merely because it was a convenient place of custody. In the present case the power which the plaintiffs gave to their clerk was that of giving transfer and delivery orders on their behalf for the express purpose of carrying out sales. It is true that the sales which they contemplated were sales made by the firm, or by the clerk within the limits of the authority given to him to effect sales on their account. Still the object of giving him the power was that sales might be thereby carried out. The mode in which that object was effected was by instructing the dock company on the authority of the clerk to transfer timber standing in the name of the firm into the name of anybody else, without any limitation whatever. True it was for the purpose of carrying out sales; but here the clerk not only transferred the timber into the name of Brown, but did so for the purpose of carrying out sales. It seems to me that under these circumstances the case stands on the same footing as that of *Henderson & Co.* v. *Williams*. (1) I see no material distinction between the specific order given in that case to place the goods in the name of Fletcher, and the general order given in the present case to place the goods in such name or names as the clerk should by his order signify. The plaintiffs for commercial purposes deliberately caused power to be given to Capon to transfer these goods into whatever name he thought fit. In the case of timber and heavy goods of that sort the only way in which they can be transferred is in the books of the company. It was the transfer made in pursuance of that power which directly made it possible for Capon to carry out the sales to the defendants. It seems to me that one ought not for this purpose to treat the case as if the sale to the defendants were something done independently of the power given by the plaintiffs to Capon. The dealing of the latter with the timber seems to me to be in pursuance of the power given to him, though not in pursuance of the terms of the authority given to him. For these reasons I think that the case falls within the scope of the dictum of Ashhurst J. to which

(1) [1895] 1 Q. B. 521.

I have referred, and therefore the defendants are entitled to judgment.

STIRLING L.J. This case appears to me to be one of great difficulty, and also of hardship, because in any view of it one of two innocent persons must suffer loss; but I have given it the best consideration which I can, and the result is that I find myself unable to differ from the conclusion arrived at by Mathew J. in the Court below. The case does not come within any of the Factors Acts. It depends entirely on the common law. It appears to me that the common law on the subject cannot be better stated than it was by Blackburn J. in the case of *Cole* v. *North Western Bank*. (1) He there said: "At common law, a person in possession of goods could not confer on another, either by sale or by pledge, any better title to the goods than he himself had. To this general rule there was an exception of sales in market overt, and an apparent exception, where the person in possession had a title defeasible on account of fraud. But the general rule was that, to make either a sale or a pledge valid against the owner of the goods sold or pledged, it must be shewn that the seller or pledger had authority from the owner to sell or pledge, as the case might be. If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded, as against those who were induced bonâ fide to act on the faith of that apparent authority, from denying that he had given such an authority, and the result as to them was the same as if he had really given it. But there was no such preclusion as against those who had notice that the real authority was limited. And the possession of bills of lading or other documents of title to goods did not at common law confer on the holder of them any greater power than the possession of the goods themselves." In the present case there is no question of a sale in market overt, or of a person having a title to goods defeasible on account of fraud; and the person who made the sales to the defendants made them without actual authority. The sole question therefore is whether the

(1) L. R. 10 C. P. 354, at p. 362.

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case comes within the exception referred to by Blackburn J. as existing where the owner of goods has so acted as to clothe the seller with apparent authority to sell the goods. On this point many authorities have been referred to during the argument, the most important of which are, I think, the case of *Johnson* v. *Credit Lyonnais Co.* (1) and that of *Henderson & Co.* v. *Williams*. (2) Both of those decisions are by the Court of Appeal and therefore binding on us. I will deal first with the one of earlier date. In that case one Hoffman, a merchant dealing in tobacco, had tobacco lying in bond at a dock in his name. The plaintiff bought the tobacco from him, but left the dock warrants for it in his possession, and took no steps to have any change made in the books of the dock company as to the ownership of the tobacco. Hoffman fraudulently obtained advances on the pledge of a portion of the tobacco from the defendants, and handed to them the dock warrants. The defendants acted in good faith, and took fresh dock warrants from the dock company. It was held, first, that Hoffman was not intrusted by the plaintiff as his factor or agent with the documents of title within 6 Geo. 4, c. 94, s. 2, which holding is not material to the present case; and, secondly, that the conduct of the plaintiff, in leaving the indicia of title in Hoffman's hands, and thus enabling him to obtain advances on the security of the goods, was not such as to disentitle the plaintiff to recover its value from the defendants. The case of the defendants there, apart from the question on the Factors Act, was rested on two grounds, one being that the plaintiff, by leaving the possession of the goods and the indicia of property in the hands of Hoffman, had enabled him to pledge the goods to them, and therefore was estopped from denying the right of Hoffman so to deal with them; and the other being that the plaintiff had been guilty of negligence, by which the defendants had been induced to deal with Hoffman as the owner of the tobacco and to pay him for it. Cockburn C.J. in giving judgment said, after discussing a number of cases, among which was *Dyer* v. *Pearson* (3): "Sitting here in a

(1) 3 C. P. D. 32.

(2) [1895] 1 Q. B. 521.

(3) 3 B. & C. 38.

Court of Appeal, I feel myself at liberty to say that these authorities fail to satisfy me that at common law the leaving by a vendee of goods bought, or the documents of title, in the hands of the vendor till it suited the convenience of the former to take possession of them, would, on a fraudulent sale or pledge by the party so possessed, divest the owner of his property, or estop him from asserting his right to it. If this had been so, there would have been, as it seems to me, no necessity for giving effect by statute to the unauthorized sale of goods by a factor." Pausing there for a moment, I may remark that there appeared to me to be great force in the observation which was made by the plaintiffs' counsel when dealing with the case of *Lamb* v. *Attenborough* (1), which is almost undistinguishable from the present case as regards its facts, to the effect that it would be a most astonishing thing if a transaction which was held not to be covered by the Factors Acts should be held to be valid as against the true owner of the goods at common law. The Lord Chief Justice proceeded: "The doctrine established in *Pickard* v. *Sears* (2) and *Freeman* v. *Cooke* (3), and the subsequent cases which have proceeded on the same principle, carry the case no further. In all the cases decided on this principle, in order that a party shall be estopped from denying his assent to an act prejudicial to his rights, and which he might have resisted, but has suffered to be done, it is essential that knowledge of the thing done shall be brought home to him." I stop there, that being the end of the judgment, so far as it relates to the first of the two grounds relied on by the defendants, to contrast that case with that of *Henderson & Co.* v. *Williams*. (4) In that case Grey & Co., the owners of sugar lying in a warehouse, were induced by the fraud of one Fletcher to transfer the goods to the order of Fletcher, and the goods were by Grey & Co.'s express instructions placed at Fletcher's disposal. Fletcher had negotiated a purchase of the sugar from Messrs. Grey & Co., the owners, by pretending that he was one Robinson, a well-known customer of theirs. Grey & Co. sent to the defendant, the warehouseman, a telegram

(1) 1 B. & S. 831.
(2) (1837) 6 A. & E. 469.
(3) (1848) 2 Ex. 654.
(4) [1895] 1 Q. B. 521.

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directing him to transfer the sugar to the order of Fletcher. The defendant replied by letter, acknowledging receipt of the telegram, and stating that he had placed the sugar at the disposal of Fletcher. The latter then proceeded to sell the goods to the plaintiffs. The plaintiffs, before concluding the contract for the purchase of the sugar, sent to the defendant to ascertain if the sugar which Fletcher proposed to sell to them was lying in the defendant's warehouse to his order. The defendant sent back to the plaintiffs a memorandum stating that he held certain sugar specified therein on account of Fletcher, and that he would deliver the same to their order on receipt of Fletcher's transfer in their favour. The plaintiffs were not satisfied with this document, and again communicated with the defendant, who wrote across the memorandum the words, "I hold the within at your order and disposal," and sent it back again to the plaintiffs. Thereupon the plaintiffs purchased the sugar from Fletcher. Two questions arose on those facts, one being as to whether there was an estoppel as against the defendant, the warehouseman, and it was held that there clearly was such an estoppel upon the correspondence; but it was also said that Grey & Co., the original owners of the sugar, had conferred on Fletcher a power of disposition over the sugar, and had thereby held him out as entitled to dispose of it, and that they were consequently precluded from disputing his right to give a good title to the sugar. Lord Halsbury L.C. said that in such cases the question was "whether the owner of goods has by his conduct allowed the person, who has either cheated him or to whom he has intrusted goods, to hold himself out as the owner so as to give a good title to a bonâ fide purchaser for value." He then referred to *Williams* v. *Barton* (1) and *Dyer* v. *Pearson* (2), and later on to the observations of Savage C.J. in the American case, *Root* v. *French* (3), and he then proceeded: "It appears to me therefore that, when once the correspondence is looked at upon which these goods were committed to Fletcher, to his order and disposition, and Fletcher was invested with a full power of disposition, it is impossible to argue that

(1) (1822–5) 3 Bing. 139; 24 R. R. 408. (2) 3 B. & C. 38.
(3) 13 Wend. 570.

this was not a holding out, by the true owner of the goods, of Fletcher as capable of giving a good title." In that case, therefore, Grey & Co. gave to Fletcher an express authority which was acted upon by the plaintiffs while it remained in force. The question raised in the present case is whether the plaintiffs have held out Capon, their clerk, to the defendants as capable of giving a good title to the timber. I do not think they have. They have, it is true, given authority to the dock company to transfer or deliver timber in accordance with the orders signed by Capon, but they never authorized the dock company to communicate that to anybody. The dock company did not communicate the authority to the defendants, nor did the defendants act on it. I do not see, therefore, how it can be said that by the authority so given they held out Capon to the defendants as having authority to deal with their timber. It does not seem to me that the observations of Lord Halsbury L.C. in *Henderson & Co.* v. *Williams* (1) as regards this point are really applicable to the facts of this case, in the absence of any knowledge by the plaintiffs of that which was being done by Capon. The plaintiffs knew nothing of the transfer of these goods into the name of Brown, or of the sales of them by Capon in that name. I confess I cannot see that in substance the case differs from that which would have been presented to us if Capon had procured the goods to be transferred into the name of Brown, and had then sent a cart for them and taken them away to some place of his own, and there disposed of them to the defendants.

But it is also necessary to deal with the second point which was set up by way of defence in *Johnson* v. *Credit Lyonnais Co.* (2), namely, that of negligence. Cockburn C.J. said in dealing with that point: "That the plaintiff, in omitting to have the goods transferred to his own name, and to have the dock warrants delivered over to him, was wanting in common prudence, in other words, was guilty of negligence, I cannot bring myself to doubt"; but he went on to say: "But whether this negligence of the plaintiff will under the circumstances give to the defendants any ground of complaint which can be

(1) [1895] 1 Q. B. 521. (2) 3 C. P. D. 32.

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enforced in point of law is a very different question. Negligence, to afford a ground of action to one who has suffered from it, must have reference to some duty which the party guilty of the negligence owed to him. The law is in my opinion correctly stated by Blackburn J. in *Swan* v. *North British Australasian Co.* (1), where, after referring to what was said by Parke B. in *Freeman* v. *Cooke* (2), namely, that 'negligence to have the effect of estopping the party must be the neglect of some duty cast upon the person guilty of it,' he goes on to say: 'This I apprehend is a true and sound principle. A person who does not lock up his goods, which are consequently stolen, may be said to be negligent as regards himself; but, inasmuch as he neglects no duty which the law casts upon him, he is not in consequence estopped from denying the title of those who may have, however innocently, purchased those goods from the thief, except in market overt.' The same principle would obviously apply to the case of goods fraudulently sold or pledged by a person left in possession of them. The rule thus laid down is applicable here. The plaintiff may have been negligent, and his negligence may have brought on the defendants the loss of the money they have advanced. But the plaintiff owed no duty to the defendants—at least no duty which the law can recognise—either as individuals or as members of the general public." With that judgment Bramwell L.J. and Brett L.J. agreed. Bramwell L.J. added nothing on the question of negligence. Brett L.J. said: "The only question remaining is as to the alleged negligence of the plaintiff, and the consequences of such negligence if it should exist. The negligence suggested is the omission to have the tobacco transferred into his own name at the dock bonded warehouse, or to have the dock warrants or delivery orders transferred to him by Hoffman. But in the face of the finding of a mercantile jury in one of the present cases, and the admission in both that what the plaintiff did was what so many mercantile men have up to this time habitually done, that to do otherwise was an exception, I feel that we ought not to hold that in the present cases the plaintiff was guilty of negligence, and therefore that

(1) (1863) 2 H. & C. 175. (2) 2 Ex. 654.

we have not to consider what the consequences of such negligence might be." It seems to me that what was said in that case is true here, and that the plaintiffs owed no duty to the defendants or to the general public in respect of these goods. I think, therefore, that the present case falls within *Johnson* v. *Credit Lyonnais Co.* (1) rather than *Henderson & Co.* v. *Williams.* (2) I come to this conclusion with much diffidence, having regard to the fact that the Master of the Rolls and my brother Vaughan Williams have come to the contrary conclusion. I desire only to add that I am far from saying that the law as I understand it with regard to this matter is in a satisfactory state. That the common law on the subject was not satisfactory may be taken as admitted from the fact that the series of Acts called the Factors Acts have been passed to remedy what was considered to be injustice produced by the common law. If I were free to speculate as to whether the loss in the present case ought, having regard to considerations of natural equity, to fall on the plaintiffs or on the defendants, it may be that I should be of opinion that it ought to fall on the plaintiffs; but I am bound to act on what I gather the law to be from the authorities on the subject; and I find myself with regret unable to agree with the other members of the Court as to the effect of those authorities.

Judgment for defendants.

Solicitors for plaintiffs: *Ward, Perks & Mackay.*
Solicitors for defendants: *Anning & Co.*

(1) 3 C. P. D. 32. (2) [1895] 1 Q. B. 521.

E. L.

C. A.
1901
July 24.

[IN THE COURT OF APPEAL.]

WHITBOURNE *v.* WILLIAMS.

Seduction—Master and Servant—Evidence of Service—Employment by Defendant—Weekly Leave of Absence—Visits to the Father's Home—Assistance in Household Duties.

The plaintiff's daughter, who was in the service of the defendant, was permitted to go out once a week for an afternoon and evening. On such occasions she went to her father's house and assisted in household duties. In an action by the plaintiff for the seduction of his daughter by the defendant while she was in the latter's service :—

Held, that there was no evidence of the relation of master and servant between the plaintiff and his daughter to support the action.

Application for judgment or a new trial in an action tried before Darling J. with a jury.

The action was brought by the plaintiff to recover damages for the seduction of his daughter by the defendant, by reason whereof she gave birth to a child, and the plaintiff in consequence lost her services. It appeared by the evidence that the plaintiff's daughter went into the service of the defendant who kept a public-house, her duties being to assist in the household work and at the bar. Her wages were 8*s*. a week with board and lodging. She was permitted by her master to go out every Tuesday or Thursday afternoon and evening, and she used on such occasions to go to her father's house, which was about a mile and a half distant from the defendant's public-house. While at her father's house she was in the habit of doing some of the household work, and she assisted her mother by taking care of the other children. Evidence was given at the trial that the girl was seduced by the defendant while she was in his service.

The learned judge held that there was no evidence of loss of service to support the action, and gave judgment for the defendant.

The plaintiff appealed.

Lynch, for the plaintiff. There was evidence of service. The service need not be under a contract—voluntary service is sufficient: *Evans* v. *Walton* (1), and very slight service such as assistance in household work is sufficient to support the action. The fact that the plaintiff's daughter was for general purposes in the service of the defendant does not necessarily negative the existence of sufficient service to the father to support the action: *Griffiths* v. *Teetgen* (2); *Rist* v. *Faux*. (3) In *Blaymire* v. *Haley* (4) there was no evidence of any service actually rendered to the plaintiff by his daughter, who at the time of the seduction was in the service of the defendant, and mere intention to return to the father's house was held to be insufficient. Here there was an actual return once in every week and services rendered on each occasion.

Stimson, for the defendant. The allegation in the statement of claim that the girl was in the defendant's service is correct, and the mere fact of her being allowed an evening out did not cause that service to cease for the time being. The action is based upon loss of service: *Davies* v. *Williams* (5); and *Thompson* v. *Ross* (6) shews that while the girl was in the defendant's service, the fact that she occasionally assisted in home duties did not create the relation of master and servant between her father and herself.

Lynch, in reply.

A. L. SMITH M.R. This is an appeal from the judgment entered by my brother Darling for the defendant in an action for damage sustained by the plaintiff by reason of the seduction of his daughter. The girl was according to the evidence engaged by the defendant, who was a publican, to assist in the public-house, and to live there with board and lodging and wages of 8*s*. a week. On one day of the week, though not as part of the contract of service, the girl was accustomed to go to her home and see her father and mother, and while there it was in evidence that she did services which it is contended are sufficient to found

(1) (1867) L. R. 2 C. P. 615.
(2) (1854) 15 C. B. 344.
(3) (1863) 4 B. & S. 409.
(4) (1840) 6 M. & W. 55.
(5) (1847) 10 Q. B. 725.
(6) (1859) 5 H. & N. 16; 29 L. J. (Ex.) 1.

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an action of seduction. I will read a few words from the judgment of Tindal C.J. in *Grinnell* v. *Wells* (1), in which he lays down what is necessary to found an action of seduction: "The foundation of the action by a father to recover damages against the wrong-doer for the seduction of his daughter, has been uniformly placed, from the earliest time hitherto, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service he is supposed to have a legal right or interest." Here we have it that the girl was in the actual service of the defendant, and and I do not see whilst she was in that service what legal right or interest the father had in the services of his daughter. I will only add that the case of *Thompson* v. *Ross* (2) is conclusive of this case. There is a remark of Watson B. in the course of the argument which covers the present case. He said, "Would you say the daughter was her mother's servant if her mistress gave her leave sometimes to go home and see her mother, and on those occasions she made tea for her mother?" That question was not answered when it was put; but when judgment was given by Pollock C.B. he described the question as decisive of the case. With that I entirely agree. I would ask, if a servant has leave to go out on Sunday, does that servant cease to be the servant of her master while out on leave? The question has only to be put to answer itself. It is clear that in such case she does not cease to be in the service of her master. I think the course taken by my brother Darling was right in the circumstances of this case, and that the appeal should be dismissed.

VAUGHAN WILLIAMS L.J. I agree. I was struck with the logic of the argument of counsel for the plaintiff, because he took up the only line that was open to him. He relied on the proposition, which is agreed to by every one, that the action for seduction is founded on a fiction, and the suggestion was that as it is founded on fiction there is no need to have any support in fact. I do not agree with this view, for I think Kelly C.B.

(1) (1844) 7 M. & G. 1033. (2) 5 H. & N. 16; 29 L. J. (Ex.) 1.

was perfectly right in saying in *Hedges* v. *Tagg* (1), "It has been truly said the action of seduction is founded on a fiction; but for that fiction there must be some foundation, however slender, in fact." Here it is plain that at the time of the seduction this girl was in the service of the defendant. That service began before the seduction and continued after. It is suggested that because during the continuance of the service the girl went home one day a week and assisted her mother to make tea and look after the children, that fact affords some foundation for saying that she was in the service of her father; but I cannot agree with this suggestion, and I think that the learned judge was right in holding that there was no evidence of service.

STIRLING L.J. I agree.

Appeal dismissed.

Solicitor for plaintiff: *Thomas Hack.*

Solicitor for defendant: *F. W. Webb, for J. W. Atkinson, Stratford.*

(1) (1872) L. R. 7 Ex. 283, at p. 285.

A. M.

[IN THE COMMERCIAL COURT.]

1901
May 14, 17;
June 26.

SCOTT & HORTON *v.* GODFREY.

Stock Exchange—Principal and Agent—Broker including Several Orders in One Contract—Liability of Principal to Jobber on Default of Broker—Usage of Stock Exchange—Privity of Contract.

The defendant employed a broker to purchase for him 225 shares on the Stock Exchange, and afterwards directed him to carry them over to the next account. The broker, having instructions from other clients to carry over for them shares in the same undertaking, carried over by a single contract in his own name 925 of these shares with the plaintiffs, who were jobbers on the Stock Exchange, and apportioned 225 of the shares so carried over to the defendant; of the total number of shares 125 were carried over on the broker's own account. Before the next settling day the broker was declared a defaulter on the Stock Exchange, and his transaction with the plaintiffs was closed by the official assignee. The defendant, when communicated with, declined to be further bound by the contract, contending that by reason of the broker's failure the transaction was closed for all purposes at the price current on the day of the failure. The plaintiffs thereupon sold the shares for the best price obtainable, and claimed to be entitled to recover from the defendant the difference between the price at which the shares had been carried over and that at which they had been sold:—

Held, that, apart from any usage of the Stock Exchange, the defendant was liable, it having been the intention of all the parties that privity of contract should be created between the plaintiffs and the defendant, and such privity having in the circumstances been created.

There is an established and valid usage on the Stock Exchange under which a broker who is instructed by different clients to buy or carry over for them shares in the same undertaking can make one contract in his own name with a jobber for the total number of shares. It makes no difference that the broker includes in the same contract shares in which he is dealing in his own name. The jobber and each client of the broker become bound to each other to carry out that part of the contract which is applicable to the order of the particular client.

ACTION tried before Bigham J. and a special jury in the Commercial Court.

The plaintiffs were a firm of stock and share dealers or jobbers, and were members of the London Stock Exchange. The defendant was an Englishman who carried on business

and resided in Belgium. On December 12, 1899, the defendant, who had previously purchased through a stockbroker named Hemmerde 225 shares in the Randfontein Exploration Company, instructed Hemmerde to carry the shares over to the end of December account. Hemmerde had had dealings for other clients in Randfontein shares which, under the instructions of those clients, were to be carried over on the same day, and he had further 125 shares which he had bought on the joint account of himself and another, and which were also to be carried over; the total number of Randfontein shares to be carried over by Hemmerde on December 12 was 925. On that day Hemmerde carried over with the plaintiffs in one transaction the 925 shares, which included his own 125 and the defendant's 225 shares; he then made the usual entries of the transaction in his books, shewing not only one carrying-over transaction of 925 shares, but also the names of the particular clients and the number of shares carried over for each client. On December 14 Hemmerde stopped payment. The plaintiffs then ascertained from Hemmerde the names of his clients in respect of the 925 shares and the number of shares in which each client was interested. The fact of Hemmerde's failure was communicated by a letter from his clerk to the defendant, in which he was asked whether he wished another broker to act for him in the transaction; the defendant replied that he was no longer bound by the arrangement, as in consequence of the broker's failure the transaction was closed at the hammer price of the day. This letter was, on its receipt on December 18, shewn by Hemmerde's clerk to the plaintiffs, who at once sold the defendant's 225 shares for the best price obtainable. The shares having fallen in value, the plaintiffs now brought this action to recover the difference in price, alleging that the circumstances shewed that a privity of contract had been created between themselves and the defendant.

At the trial Dr. Richardson, the official assignee of the Stock Exchange, was called as a witness, and gave evidence that where a broker was instructed by several clients to buy shares in the same company, it was the practice on the Stock

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Exchange for the broker to enter into one contract with the jobber for the total number of shares, and that by the practice of the Stock Exchange the jobber was bound to know that the contract might be made by the broker on behalf of more clients than one, and if the contract was made for several clients the jobber was compelled to carry out the contract with each; that if in such a contract only one of the broker's clients required delivery of the shares purchased, the jobber was bound to carry out the contract with that particular client; and that this practice was applicable to carrying-over transactions as well as to the completion of contracts of purchase. He further said that where a broker became a defaulter it was the custom for his clients to complete the transaction with the jobber direct, although the orders of several clients might have been included by the broker in one contract with the jobber, and that the same rule would apply if the broker were to include a transaction of his own with those of his clients. The chairman and deputy-chairman of the Stock Exchange gave evidence to the same effect.

The questions left by the learned judge to the jury, and their answers, were as follows :—

(1.) Is there a custom or practice of the Stock Exchange by which brokers lump together the orders of their clients and execute them by means of one contract with a jobber?—Yes.

(2.) Did the defendant give his order to his broker on the terms that it might be executed in that way?—Yes.

(3.) Is there a further custom or practice by which the jobber and each client of the broker become bound to each other to carry out that part of the contract applicable to the particular client's order?—Yes.

(4.) Did the addition to the carrying-over order of the broker's own bargain in any way affect the price?—No.

(5.) Was the case within the custom?—Yes; but it is not expedient for a broker to include his own bargains in an order executed for his clients.

May 17. *Rufus Isaacs*, K.C. (*J. R. Atkin* and *G. A. H. Branson* with him), for the plaintiffs. There was privity of

contract between the plaintiffs and the defendant. Apart from the custom, privity was established; for the contract entered into by the broker was a distributable contract; he was authorized by the defendant to contract subject to the rules and regulations of the Stock Exchange, and to create privity between the defendant and the plaintiffs; he was similarly authorized by his other clients, and both the broker and the plaintiffs intended to create contracts by which each of the clients should be bound. The case of *Robinson* v. *Mollett* (1), which is relied upon by the defendant, has no application; the substance of that decision is that a person who is employed as a broker or agent cannot transform himself into a principal in the transaction, and sell his own goods to his client without notice to his client, and that the custom there relied upon was inadmissible, because it had the effect of making the agent a principal in a transaction with his own principal, whereas the agent's duty was to bring about privity of contract between his principal and a third party. The dictum of Cleasby B. in the Exchequer Chamber (2) is strongly in the plaintiffs' favour. But in any event the defendant is liable under the custom or usage of the Stock Exchange, for by that custom, as proved, the jobber is bound to execute the contracts made for the several principals for whom the broker in fact acted.

[BIGHAM J. If, without a custom, the client is not bound because no contract has been made, can the custom make a good and binding contract?]

Yes; apart from custom a broker is not liable upon a contract-note or other document signed by him, but evidence is admissible to shew that by custom he is liable: *Hutchinson* v. *Tatham*. (3) There was an actual appropriation by the plaintiffs in their books of 225 shares to the defendant, and the state of circumstances arose contemplated by Cleasby B. in his judgment in *Mollett* v. *Robinson* (4), where he says that, even if the usage did not make the contract distributable, the principal would have been entitled to the benefit of an appropriation, and might have sued the vendors in the broker's name. The

(1) (1875) L. R. 7 H. L. 802.
(2) (1872) L. R. 7 C. P. 84, at p. 94.
(3) (1873) L. R. 8 C. P. 482.
(4) L. R. 7 C. P. at p. 84.

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plaintiffs, knowing that they were dealing with an agent, had notice that they would probably have to split up the contract. The inclusion of the broker's own purchase in the contract does not affect the case; the jury have found that it did not alter the price, and it can be treated as an independent contract. Lastly, there was an effective repudiation of the contract by the defendant, which entitled the plaintiffs to close the transaction. The defendant acted under the erroneous belief that the hammer price closed the bargain, whereas it only binds members of the Stock Exchange inter se, and does not affect members of the public: *Levitt* v. *Hamblet*. (1)

Herbert Reed, K.C. (*Boydell Houghton* and *A. H. Chaytor* with him), for the defendant. No privity of contract was created between the plaintiff and defendant. Apart from custom, the contract made by the broker with the plaintiffs was not a distributable one at common law. This is clearly the view taken in *Beckhusen* v. *Hamblet* (2), and also the view of Darling J. in *Cullum* v. *Hodges* (3), where the decision was that custom did not make a contract distributable where the orders of several clients were lumped together in one contract by a broker. The evidence of the custom was vague, and should not have been left to the jury. No doubt a practice was shewn by which brokers, for the sake of convenience, include the orders of several clients in one contract; but the question is not whether the broker was at liberty to do so, but whether, being authorized to buy 225 shares, he bought them; whether he made a contract which made the jobbers the sellers and the client the buyer of that number of shares. The legal result of the transaction was that the broker made one contract with the jobbers for 925 shares, which was his own contract, and appropriation by him to his client of a part of the contract did not make it the client's contract. The case is not advanced by proof of the alleged custom; for when once it is conceded that the broker's only authority is to buy 225 shares, the jobber must prove that that order was given to him by the broker; the order cannot be proved by implication.

(1) Ante, p. 53. (2) [1900] 2 Q. B. 18; ante, p. 73.
(3) (1900) 17 Times L. R. 21.

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[BIGHAM J. Suppose that a broker instructed to buy 225 shares could only get 125 from one jobber and 100 from another, would the client be bound ?]

Yes ; the authority would be one to buy up to 225 shares. Further, a custom, if any such existed, by which the broker mixed up his own personal transactions with those of his clients would be an unreasonable custom, and could not be supported. And knowledge of a special custom altering the rule of the common law cannot be imputed to the defendant, who was a foreign principal residing abroad. No repudiation had been communicated by the defendant to the plaintiffs at the time when the latter closed the transaction by selling the shares, and such repudiation was a condition precedent to the plaintiffs' right to sue.

Rufus Isaacs, K.C., in reply, cited *Pike* v. *Ongley*. (1)

Cur. adv. vult.

June 26. BIGHAM J. In the present case the plaintiffs were a firm carrying on business as stock jobbers on the Stock Exchange. On December 12, 1899, the defendant instructed his broker, a Mr. Hemmerde, to carry over, subject to the rules, regulations, and usages of the Stock Exchange, 225 Randfontein shares to the end of December account, and accordingly on the same day Hemmerde carried over with the plaintiffs that number of shares. The broker also, in accordance with the usage of the Stock Exchange, carried over other shares in the same company which he had to carry over for other clients, and in carrying over all these Randfontein shares with the plaintiffs he carried over in one transaction 925 shares. The business was done in this way. The broker intimated to the plaintiffs that he wished to carry over in all 925 shares for the end of December account ; he did not specify the names of the various clients for whom he was acting, nor did he mention the different numbers of shares which he wished to carry over for each particular client ; but the plaintiffs knew that the transaction which the broker was carrying through

(1) (1887) 18 Q. B. D. 708.

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was one which might be, and which probably was, carried out for many different clients. On December 14 the broker failed. The plaintiffs thereupon asked the broker for the names of his principals for whom they were carrying over these 925 shares, and the broker gave the names, among them being that of the defendant in respect of 225 shares. It appears that as soon as the defendant heard that his broker had failed, he intimated to the broker through one of the broker's clerks that he considered he was no longer bound by the contract, and he claimed to be entitled to settle the transaction at the market price of the day when the broker stopped payment. The fact that the defendant declined to be further bound was communicated by the broker's clerk to the plaintiffs in the ordinary course of business, and the plaintiffs closed the transaction, as in my opinion they were entitled to do, supposing that there was in law a contract between them and the defendant; the latter had said that he was no longer bound by the arrangement (in other words, that he would not take up the shares at the end of December), and had intimated his view in a way which, in my opinion, amounted to notice to the plaintiffs that he would not perform the engagement. Under these circumstances I think that the plaintiffs, assuming that they had a contract with the defendant, were entitled to act as they did, and to sue the defendant for damages. On December 18, the day when the defendant's letter was communicated to them, the plaintiffs sold the 225 Randfontein shares, and they are now suing the defendant for the difference between the price at which they were carried over on December 12 and the price at which they were sold on December 18—a sum of 136*l*. The defendant contends that he is not bound to pay, because no contract had ever been made between the plaintiffs and himself.

The contention on behalf of the defendant, as I understand it, is that, having given a mandate to his broker to carry over 225 shares, that mandate was in fact never carried out; that the transaction of the broker with the plaintiffs, by which 925 shares were carried over, could not be regarded as a carrying out of his mandate; and that therefore, as his agent had not

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carried out the only transaction which he was authorized by him to enter into, there was no contract between the plaintiffs and the defendant. What happened was that on December 12 the broker, having authority from the defendant to carry over 225 shares on his behalf, and having also authority from a number of other clients to carry over parcels of shares in the same company, went to the plaintiffs and, adding all the shares together and acting for all his clients, told the plaintiffs to carry over 925 shares in one transaction. No writing passed between the plaintiffs and the broker, nor is it usual that any writing should pass in such a case, the practice being for each to make a note of the transaction in his own books, which is the only record of the transaction. The broker, after entering into this transaction with the plaintiffs, went back to his office and made an entry of it in his own book: on the one side the entry shewed that he had carried over 925 shares with the plaintiffs, and on the other side that 925 shares had been carried over for particular clients, the number of shares carried over being inserted against each name; thus the defendant's name appears in the broker's book as that of the person for whom he had carried over 225 shares with the plaintiffs, being parcel of the 925 shares carried over with them. The defendant was then advised by his broker of the carrying over.

The question which I have to determine upon the above state of facts is whether privity of contract was established between the plaintiffs and the defendant by this transaction; for if not, the plaintiffs cannot recover in this action, which is an action of contract. Whether there was or was not a contract is, in my opinion, a question of the intention of the parties. When the broker went to the plaintiffs and carried over the 925 shares he, in my opinion, intended as to 225 of them to make a valid contract on behalf of his principal, the defendant, with the plaintiffs; he intended to do that which the defendant had directed him to do. On the other hand, the plaintiffs, in my opinion, intended to make with the broker any number of contracts which he might be authorized by his different principals to make. It is true that the plaintiffs did not ask the broker either for the names of the clients or for

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the number of shares belonging to each particular client; but they knew that the broker, when he entered upon the transaction, was probably acting for more than one client; and therefore I think the intention of the plaintiffs was to make such a number of contracts as the broker had instructions to enter into. Thus there was a mutual intention on the part of the plaintiffs and the broker to bring about privity of contract between the plaintiffs and the broker's respective clients. I think myself that that was sufficient to establish the necessary privity. But in addition the jury have found that there is a usage on the Stock Exchange (which in fact was admitted by the defendant) by which the broker lumps together the orders of his clients and executes them by one transaction with the jobber, and by which the jobber and each client of the broker become bound to each other to carry out that particular part of the contract which relates to the order of the particular client. In my opinion, privity was clearly established by the fact that authority was given by the defendant to his broker to create the privity, and that the latter intended to create it, and that the person with whom he made the bargain intended that it should be created.

The defendant relied upon the case of *Robinson* v. *Mollett* (1), but it appears to me to have no application. The judgment of Lord Chelmsford in that case (in which the rest of the Lords concurred) proceeded, I think, upon the view which he took of the particular facts. After setting out the facts, he says: "In the arguments and in the judgments in this case, it seems to have been taken for granted that the custom applies in the case of a single transaction of a broker buying in the market upon the order of a principal. But upon a careful examination of the terms of the custom as stated, it appears to me that it merely regulates the dealings of brokers amongst themselves, in buying and selling as principals, and the mode of adjusting and settling accounts with each other, and that no part of it is applicable to the ordinary employment of a broker engaged to buy for a real principal." Lord Chelmsford was apparently of opinion that the custom

(1) L. R. 7 H. L. 802.

in that case had no application at all to the transaction between the plaintiffs and the defendants, but that it was a custom applying only to dealings between the brokers themselves. Then he goes on to say: "Assuming, however, that the custom would have applied in the present case if it had been known to the appellant at the time of employing the respondents as his brokers, the question arises whether it is of such a nature as to be binding on a person who is ignorant of its existence by merely employing a broker to buy for him in the market where the custom prevails," and he holds that it was not. He says, as I understand, that inasmuch as it was a custom by which the broker became entitled as between himself and his client to convert the mandate which he had received to make a contract with a third party into a mandate to make one between himself and his client, it was not a custom which in the absence of express knowledge could bind the client. That is all that that decision lays down; and Lord Chelmsford says that on the facts of that case no contract was made between the client and the vendor. In that case there had been apparently a vague intention on the part of the plaintiffs, the brokers, to appropriate to the defendant some part of the tallow which they, the brokers, had purchased in supposed execution of their client's (the defendant's) order; and as to that intention to appropriate Lord Chelmsford says (1): "Now the mere intention to appropriate a portion of the tallow agreed to be purchased from Simpson & Co. and Rayner & Co. respectively, could not possibly establish a privity between them and the appellant, even if the delivery of a smaller quantity than that which they had agreed to sell could have been enforced against them." I do not, however, think that Lord Chelmsford meant that an actual appropriation might not have created privity, if it had been made with that intention. In the present case there was not only an intention on both sides to create a contract which should bind the plaintiffs on the one side and the defendant on the other, but there was an actual appropriation of part of the 925 shares in the books of the broker to the fulfilment

(1) L. R. 7 H. L. at p. 837.

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of this contract. It appears to me to be like the case imagined for the purpose of illustration by Cleasby B. in giving judgment in *Mollett* v. *Robinson* (1) in the Exchequer Chamber. That learned judge said (2): "If the plaintiffs, as soon as the contract with Simpson & Co. was made, had (as it is said they intended to do) really appropriated 50 tons of it to the defendant, and that contract had continued in force until the time for performance, the defendant would have been entitled to the benefit of that appropriation, and would have been entitled (supposing the usage did not make it a distributable contract among the purchasers, so as to entitle each to sue in his own name) to sue in the name of the plaintiffs, and recover damages." In the present case I think there arose the state of facts contemplated by Cleasby B. in that passage of his judgment, and I therefore think that privity of contract between the plaintiffs and the defendant was established.

Two recent decisions may be referred to as illustrating the point with which I am dealing. In *Beckhusen* v. *Hamblet* (3) the circumstances closely resembled those of the present case, and Kennedy J. said in the course of his judgment (4): "Let it be assumed that there is a usage on the Stock Exchange, legally valid and known to and binding upon a client such as the defendant, that a stockbroker employed in the purchase of shares for a client properly may, if he thinks it convenient, fulfil his duty to his client although, instead of creating, as it is ordinarily a broker's duty to create, a contractual relation between his client and the seller he lumps the client's order with other orders and in his own name contracts in a single transaction with the selling jobber for the purchase of a larger number of shares than the client has instructed him or authorized him to buy. What follows from this assumption? This only, as it appears to me: that, as the broker will have fulfilled his duty according to usage, the client cannot complain, and is bound to pay the broker his commission and indemnify him against such liabilities as the broker may necessarily or properly

(1) L. R. 7 C. P. 84.
(2) L. R. 7 C. P. at p. 94.
(3) [1900] 2 Q. B. 18; ante, p. 73.
(4) [1900] 2 Q. B. at p. 26.

incur in the course and for the purpose of his employment. Surely the usage in no way assists the plaintiffs' case here." I may here remark that *Beckhusen* v. *Hamblet* (1) was an action brought (as in the present case) by a firm of jobbers upon a contract supposed to exist between the broker's client and the jobbers. "The plaintiffs' case," continues Kennedy J., "is not a case of a broker suing his client for indemnity in respect of shares bought for the client in a way which is sanctioned by the rules and usages of the Stock Exchange, but it is the case of a seller seeking to have recourse against the principal of a broker who has contracted with the seller in his own name by a contract for the purchase of a larger number of shares than that which the client authorized, and which included a number which were being obtained by the broker for a different client. The usage cannot operate, in my judgment, so as to make a man liable upon a contract which is not, in point of law, *his* contract; it cannot create contractual rights between parties where none exist according to legal principle." With much of that I entirely agree, but I do not agree with the view that there is no contract created. In my opinion a contract was created in *Beckhusen* v. *Hamblet*. (1) If there was no contractual relation created, there was of course no liability on the part of any one; but I think it is a mistake to suppose that, because the broker carried over a number of shares for different clients in one transaction, he did not create a privity of contract between each client and the jobber with whom the transaction was carried through. Privity of contract is established by the intention of all the parties. That case went to the Court of Appeal (2), and the appeal was dismissed on the ground that the existence of the alleged usage had not been established; the Court of Appeal, however, said that the decision was not to prejudice the right of the plaintiffs to raise the question of the existence and validity of the usage in another action.

The other case is that of *Levitt* v. *Hamblet* (3), in which the

(1) [1900] 2 Q. B. 18; ante, p. 73.
(2) Ante, p. 73.
(3) Ante, p. 53.

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Court of Appeal discussed *Robinson* v. *Mollett* (1) and pointed out the distinction which I have endeavoured to point out between it and the case which they were considering. I need only read a passage from the judgment of Romer L.J. (2): "I would add one remark about what was said with reference to certain statements made by Lord Chelmsford in *Robinson* v. *Mollett* (3) about a mere intention of appropriation not establishing privity. I think that the effect that was sought to be given to that statement of Lord Chelmsford as if it were a decision that the intention was always immaterial cannot be supported for the reason given during the argument, that the appropriation in that case would have involved the taking of a part out of the whole bulk. I should like further to say that whether a person does or does not buy at a particular time shares for a certain undisclosed principal is a question of fact, though it may depend on the intention of the person at the time he buys, and though it may be difficult to prove the intention as a question of fact, yet undoubtedly as a matter of law it may be done, and it is not right to say that because it may be a difficult thing to prove the intention cannot be proved. There are many cases in which it is essential to prove intention as a question of fact; and when it is essential, then it is necessary to get such evidence as can be obtained on the subject in order to ascertain—which is no doubt always a difficult thing—what was in a man's mind at the time of a certain act being done. That often has to be done and is done from day to day, and it is impossible to say, when you once get the position that the question of intention is a question of fact, that you are not at liberty to prove certain facts because they depend on intention."

In the present case the broker was instructed by the defendant to make a contract for him with a jobber; the broker went with that mandate to the plaintiffs and made a contract; it is true that he made it as part of a larger transaction which included other contracts, but he made the contract which he

(1) L. R. 7 H. L. 802. (2) Ante, at pp. 71–72.
(3) L. R. 7 H. L. 802, at p. 837.

was instructed by his client to make, and, in my opinion, that is of itself sufficient. But there is more than that in the present case; for, having made the contract, the broker appropriated in his books to each client the number of shares necessary to fulfil his instructions from him, appropriating 225, parcel of the 925, shares to the defendant. I am absolutely satisfied that if, instead of the jobbers suing the broker's principal, the broker's principal had been suing the jobbers, the latter would have had no answer to the action; and, if that is so, there must be a correlative right by which the jobbers are entitled to sue the broker's principal.

Another point was taken in argument. When the broker carried over the 925 shares, he had jointly with a third party a personal interest in 125 of them; they were carried over to that extent on his own account, and the suggestion is that in some way or other this invalidated the transaction. In my opinion, the transaction is in no way affected by the fact; it is just as if the broker had bought or carried over the shares for himself by a separate transaction. The jury found as a fact that the inclusion of the broker's shares made no difference in the carrying-over price, and the broker's other clients in no way suffered in consequence. If I am right in saying that the transaction as to the 925 shares can be resolved into its component parts, each of these parts becomes a separate transaction, and therefore the shares in which the broker was personally interested formed an entirely separate matter, which did not affect in any way the position of the plaintiffs and the defendant towards one another.

One other question has been raised, as to whether there was any evidence of repudiation of the contract by the defendant on December 18. It is said that as his intention no longer to be bound by the transaction was only communicated by him to the broker's clerk, there was no communication of his intention by him to the plaintiffs. I think there is nothing in the point. When his intention was communicated to the broker's clerk the defendant meant that it should be communicated to all persons interested in the transaction, and it was in fact communicated to the plaintiffs—who acted upon it, as they were

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entitled to do. For the reasons I have given, my judgment must be for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Spyer & Sons.*
Solicitors for defendants: *Webbers & Duncan.*

W. J. B.

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May 7.

IGOE *v.* SHANN AND OTHERS.

Licensing Acts—Licence—Renewal—Value of Premises—Objection—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 45.

In order to justify an objection to the renewal of a beerhouse licence on the ground that the premises are not of the annual value required by s. 45 of the Licensing Act, 1872, it must be shewn that the premises were not at the date of the passing of that Act licensed for the sale of intoxicating liquor for consumption thereon.

CASE stated by the quarter sessions for the county of Lancaster, from which the following facts appeared.

The appellant was tenant of an inn at Manchester, in respect of which he was licensed to sell beer by retail for consumption on or off the premises. On August 9, 1900, notice of objection to the renewal of his licence was served upon him, the material objection being that the premises were not of the necessary annual value. At the general annual licensing meeting for the city of Manchester, held on August 23, 1900, the case was adjourned to September 6, 1900, when evidence was heard and the case further adjourned to September 21, 1900, when the licensing justices refused to renew the licence upon the ground that the premises were not of the necessary annual value.

It appeared that the appellant's inn was originally licensed for the sale of beer by retail to be consumed on or off the premises in 1868, and that the licence was yearly renewed down to 1886. At the general annual licensing meeting in 1886 the renewal of the licence to Edwin Wade, the then licensee, was objected to, and at the hearing of the objection at an adjourned

meeting the licence was refused. Wade continued to carry on business in the house until October 8, 1886, on which day he gave up possession to Jane Jackson, who became the new tenant and occupier, but did not at the date obtain any licence or transfer authorizing her to continue the business. The then current licence expired on October 10, 1886, two days after her entry, and Jane Jackson carried on business and sold beer by retail from October 8, 1886, to October 12, 1886, but not under a justices' licence. On October 12, 1886, she applied to a special licensing sessions under 9 Geo. 4, c. 61, s. 14, for the grant of a licence to her in respect of the premises; the licence was granted, and was annually renewed until September 21, 1900. The annual value of the premises on September 21, 1900, exceeded 15*l.*, but was less than 30*l.*, and the premises were situated in a city having a population exceeding 100,000.

It was contended on behalf of the appellant that, inasmuch as the house was on August 10, 1872, licensed for the sale of intoxicating liquors for consumption on the premises, the qualification in respect of annual value prescribed by the Licensing Act, 1872, s. 45 (30*l.*), did not apply to the premises, but that the qualification which did apply was that prescribed by 3 & 4 Vict. c. 61, s. 1, namely, 15*l.*

The respondents contended that the licence held at the time of the passing of the Licensing Act, 1872, having lapsed in 1886, the house thereupon ceased to be qualified to receive any other or new licence except upon the conditions as to annual value required by the Licensing Act, 1872, s. 45, and that upon the true construction of that section the conditions therein prescribed as to annual value applied to all licensed premises of which the licence had not been in existence continuously from August 10, 1872, down to the application for the renewal thereof, or to which a licence other than that existing on August 10, 1872, had been granted since that date.

The court of quarter sessions held that the value qualification prescribed by the Licensing Act, 1872, s. 45, applied to the house, and dismissed the appeal upon the ground that the house was not of the necessary annual value as required by that section.

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The question for the opinion of the Court was whether the decision of the court of quarter sessions was right. (1)

Joseph Walton, K.C. (*J. R. Randolph* with him), for the appellant. The objection to the renewal was bad. The case does not fall within s. 45 of the Licensing Act, 1872, which is a disqualifying section; the second paragraph, which alone could apply to a beerhouse having an off-licence, applies only to premises not licensed at the date of the passing of the Act; at that date these premises were in fact licensed, and had been licensed for many years. This special statutory disqualification cannot be extended by the mere fact that there was a period of two days in 1886 during which there was no licence; it is not the continuity of the licence, but solely the existence of a licence at a specified date, that is contemplated by the section.

J. F. Byrne, for the respondents. The jurisdiction of licensing justices is limited by s. 45, and the case falls within that section. It was intended to prevent justices granting any licence unless the premises were of a certain value, the only limitation on the section being that licences in existence at the date of the passing of the Act are to be saved. The licence saved by that section is a licence to a particular person in respect of particular premises; the house has no privilege apart from the licence, and if the licence in force at the passing of the Act is afterwards dropped, it cannot be that for all time the house is entitled to have a licence. [He cited *Freer* v. *Murray*. (2)]

(1) By the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 45, "Premises to which at the time of the passing of this Act no licence under the Acts recited in the Wine and Beerhouse Act, 1869, authorizing the sale of beer or wine for consumption thereupon is attached, shall not be subject to any of the provisions now in force prescribing a certain rent or value or rating as a qualification for receiving any such licence.

"Premises not at the time of the passing of this Act licensed for the sale of any intoxicating liquor for consumption thereupon shall not be qualified to receive a licence authorizing such sale unless the following conditions are satisfied: (*a*) The premises . . . . shall be of not less than the following annual value: If situated . . . . within the limits of a town containing a population of not less than 100,000 inhabitants, 50*l*. per annum; or if the licence do not authorize the sale of spirits, 30*l*. per annum."

(2) [1894] A. C. 576.

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LORD ALVERSTONE C.J. The only point for our decision is whether, where premises have been licensed substantially continuously since 1868 (I say "substantially" continuously, because of the break to which I will shortly call attention), an objector who gives notice of an objection to the renewal of the licence under s. 42 of the Licensing Act, 1872, can take the point that the premises are not of the annual value which is required in the case of certain premises by s. 45 of that Act. In the present case there was a break of two days during which the premises were not in fact licensed, and I assume for the purpose of my decision that the licence which Jane Jackson obtained on October 12, 1886, was a new licence; that licence was continuously renewed down to 1900, when its renewal was refused. No question arises here of the general jurisdiction of the licensing justices; the only question we have a right to consider is as to the particular objection to the annual value of this particular house. If the learned counsel for the respondents is right in saying that s. 45 of the Act of 1872 deals with a licence granted to a particular person, and that when once the licence to that person has ceased the premises become new premises for the purpose of obtaining a licence, the decision appealed from is right; but to decide this point we must have regard to the language used in the statute. For reasons which it is unnecessary for me to consider, the statute draws a clear distinction between premises which were in fact licensed under the Beerhouse Act on August 10, 1872 (when the Licensing Act, 1872, came into force), and other licensed premises; the section provides that premises to which at that date no licence under the Acts recited in the Wine and Beerhouse Act, 1869, authorizing the sale of beer and wine for consumption thereon, was attached were not to be subject to the provisions then in force. It was a curious way of arriving at the desired result; it might have been done by saving the conditions as to existing houses, but the Legislature thought they had done the same thing by saying that houses which have no licence under the Acts referred to are not to be subject to the existing conditions. They then went on to deal with the other class of house which was made subject to the new

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conditions, and they provided that premises which were not at the time of the passing of the Act licensed for the sale of any intoxicating liquor for consumption thereupon were not to be licensed except upon certain conditions.

In my opinion, when a reasonable interpretation is placed upon s. 45 (although certainly the first limb of the section is awkwardly expressed), in order to authorize licensing justices to give effect to such an objection as the present, the premises must come within the second class of premises mentioned in sub-s. 2—that is to say, they must be premises which were not at the time of the passing of the Licensing Act, 1872, licensed for the sale of any intoxicating liquor for consumption thereon. When, therefore, the section is read with an endeavour to give it an intelligible meaning, I think it is clear that it was intended to draw a distinction between premises which were licensed at the date of the passing of the Act and premises which were not licensed at that date. This particular objection, then, cannot be raised by an objector who makes an objection under the powers given by statute, and if the renewal is to be refused it must be upon the general grounds of the discretion of the licensing justices. In my opinion the decision of the licensing justices and of quarter sessions ought to be reversed.

LAWRANCE J. I agree.

Appeal allowed.

Solicitors for appellant: *R. B. Wheatley, Son & Daniel, for Cobbett, Wheeler & Cobbett, Manchester.*

Solicitors for respondents: *Hockin, Raby & Beckton, Manchester.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
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May 3, 4, 23.

MILMAN *v.* LANE.

Will—Limitation—Heirs "and Assigns" of Survivor.

A testator, who was seised in fee of a farm, devised it to the use of his nephew for the term of ninety-nine years if he should so long live, and from and after the determination of such term and estate to the use (in succession) of the nephew's four sons for a term of ninety-nine years if they should so long live, with an ultimate devise on the death of the survivor upon trust to and for the use of the heirs and assigns of the survivor of the four sons:—

Held, that the word "assigns" could not be construed as giving a power of appointment to the survivor; that the limitation to the heirs and assigns of the survivor must be construed as a limitation to the heirs of the survivor and their assigns, and that upon the death of the survivor his heir-at-law was entitled to recover possession of the property from a purchaser to whom the survivor had conveyed it in his lifetime.

APPEAL from a judgment of Lawrance J. in favour of the plaintiff in an action to recover possession of a farm called Ranscombe, in the county of Devon.

By his will, dated December 27, 1830, John Vicary, who was seised in fee of the premises in question, devised them to the use of his nephew Edward Milman and his assigns for a term of ninety-nine years from the testator's decease if he should so long live, and after the determination of that estate in trust for such one or more of the sons of Edward Milman as he might limit or appoint, and in default of such limitation or appointment to the use of the heirs male of the body of Edward Milman. And in default of such issue male, or in case of their dying under the age of twenty-one years, then to the use of the testator's nephew William Milman for the term of ninety-nine years commencing from the determination of the estate limited to Edward Milman and the heirs male of his body if he should so long live. Similar terms of ninety-nine years in remainder were then devised in succession to the use of John, Edward, William, and Richard, the four sons of the testator's nephew William Milman, and their assigns, and the ultimate devise was in the following terms: "From and after the

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determination of the last-mentioned term and estate or the death of the survivor of them the said William Milman and his said four sons then upon trust to and for the only use and behoof of the heirs and assigns of the survivor of them the said John Milman, Edward Milman, William Milman and Richard Milman, the four sons of my said nephew William Milman for ever and to and for no other use trust interest or purpose whatsoever."

The testator, John Vicary, died in 1830, and his will was duly proved in November, 1831; his nephew, Edward Milman, survived him, but died a bachelor in 1849. The testator's nephew William Milman and his four sons, John, Edward, William, and Richard Milman, all survived the testator, but were deceased at the date of the writ. Richard Milman, who was the survivor, died on December 29, 1899, without issue, leaving the plaintiff (who was the only surviving child and descendant of his eldest brother, John Milman) his heiress-at-law. Richard Milman, to whom his three brothers conveyed their interest in the farm, before he became the survivor conveyed the premises in fee simple to the defendant's father, who subsequently conveyed them to the defendant.

The case was tried at the Exeter Assizes before Lawrance J., who gave judgment for the plaintiff. The defendant appealed.

May 3, 4. *Warmington*, *K.C.*, and *Foote*, *K.C.* (*Duke*, *K.C.*, with them), for the defendant. The rule in *Shelley's Case* (1) does not apply, and the word "heirs" is not a word of limitation, there being no preceding life estate, but only a chattel interest; the "heir" must, therefore, take by purchase as persona designata. That being so, the question is as to the construction of the words "and assigns" coupled with the word "heirs" used as a word of purchase. In accordance with the general rule of construction, some meaning must be given to all the words used, if a reasonable meaning is possible. The word "assigns" cannot, it is admitted, be construed in such a case in accordance with its strict meaning, for a person cannot assign that which he has not himself; but in order to give

(1) (1581) Co. Rep. 93 b.

effect to the words the Court will construe "assigns" as equivalent to "appointees," and will read them as importing a general power of appointment by the survivor of the four sons: *Quested* v. *Michell* (1); *Attorney-General* v. *Vigor*. (2) If the survivor exercises the power, he thereby constitutes the person or persons to take by purchase a person or persons designated by the will under the word "assigns"; if he does not exercise it, the heir takes as persona designata. In order to give effect to this construction, the only change of words necessary is the slight alteration of "and" into "or," whereas the construction contended for by the plaintiff gives no effect to the word "assigns." There can be no doubt that the testator's intention was in substance that the survivor of the four sons should have the power of disposing of the whole estate in the land, and to that intention the construction contended for by the defendant gives effect. No doubt the words "and assigns" are otiose in conveyancing when coupled with the word "heirs" used as a word of limitation, because in that case they merely import the power to assign, which is an ordinary incident of ownership; but they cannot be treated as otiose when they are coupled with the word heirs used as a word of purchase designating the object of the gift. A reasonable meaning can be given to the words, and there is no more reason for rejecting them than there is for rejecting the word "heirs" with which they are collocated. No special or technical words are necessary in order to create a power: Farwell on Powers, 2nd ed. p. 48. It is sufficient if the intention clearly appears that the person in question shall have the power: *Brookman* v. *Smith* (3); *Tapner* v. *Merlott* (4); *In re Walton's Estate* (5); *Idle* v. *Cook*. (6)

[They also contended that, assuming a power of appointment in the survivor of the four sons to be imported by the word "assigns," the power had been well exercised; but, having regard to the judgment of the Court, it is unnecessary to give the argument on that point at length.]

(1) (1855) 24 L. J. (Ch.) 722; 3 W. R. 435.

(2) (1803) 8 Ves. 256, at p. 291.

(3) (1871) L. R. 6 Ex. 291; (1872) L. R. 7 Ex. 271.

(4) (1739) Willes, 177.

(5) (1856) 8 D. M. & G. 173.

(6) (1705) 1 P. Wms. 70.

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R. F. Norton, K.C., and *McKellar* (*A. Loosemore* with them), for the plaintiff. The words "and assigns" as used in this devise are mere surplusage. In many other passages of this will these words are used, in conjunction with the word "heirs," as mere conveyancing verbiage, and where they cannot possibly have any meaning; and it is more reasonable to suppose that the testator used the expression "heirs and assigns" in the passage in question in the same way than to put such a strained construction upon them as to suppose that he intended them to mean such persons as the survivor should appoint, and in default of any appointment to the heirs of the survivor. When the testator meant to give a power of appointment, he knew how to do so in express terms, as may be seen in the previous provisions of this will. *Quested* v. *Michell* (1) did not lay down any general rule of construction, but was determined on the very peculiar circumstances of that case. It was stated by the very eminent conveyancing counsel who argued for the plaintiff in *Brookman* v. *Smith* (2) to be a case which must have been decided with reference to the very peculiar provisions of the will there in question, not supported by other authorities, and inconsistent with the view generally adopted in practice of an ultimate limitation to heirs and assigns. *Brookman* v. *Smith* (3) is a strong authority in the plaintiff's favour. In the present will a term was given in the first instance instead of a life estate in order to prevent alienation by the survivor.

[They also contended that the power, if any, had not been well exercised by an exercise by a person before he became the survivor.]

Foote, K.C., in reply.

May 23. The written judgment of the Court was delivered by

ROMER L.J. The question for our decision on this appeal concerns the effect of the ultimate devise in the will of John Vicary of his Ranscombe estate, after the determination of the term of ninety-nine years previously created in favour of the

(1) 24 L. J. (Ch.) 722; 3 W. R. 435. (2) L. R. 6 Ex. 291, at p. 297.
(3) L. R. 6 Ex. 291; L. R. 7 Ex. 271.

testator's nephew William Milman and the nephew's four sons respectively. This ultimate devise is to the use of the heirs and assigns of the survivor of the four sons. It is to be observed that in the devise the estates granted are legal. And further, that as none of the sons took any prior estate except in respect of his term of ninety-nine years, the rule in *Shelley's Case* (1) does not apply. And it cannot be validly urged, and indeed it is not contended on behalf of the appellant, that the ultimate gift can be read as one to the survivor and his heirs and assigns. In other words, it is beyond dispute that the heirs of the survivor take by way of direct gift, and the only question is what is the effect under the circumstances of the addition of the words "and assigns" in the legal remainder granted to the heirs and assigns of the survivor. The question is one strictly of real property law.

The appellant asks the Court to hold that the remainder is to be read as a gift to such uses as the survivor shall appoint, and, in default of appointment, or so far as no such appointment shall extend, to the use of the heirs of the survivor. It appears to us that this is asking the Court to imply overmuch by reason of the employment of the words "and assigns" in the legal limitation in question. In the first place the appellant asks us to change the word "assigns" into the word "appointees." Having got so far, he is next embarrassed by the word "and," which is used in the limitation, for there would be considerable difficulty in determining the effect of a legal remainder to the heirs and appointees of a person as personæ designatæ. He therefore next asks us to read "or" for "and," and to treat the limitation as one to the use of the heirs or appointees of the survivor. And then he says the way is comparatively easy to read the gift as one to the appointees or heirs, and as consequently meaning when fully expanded the limitation he is contending for.

We do not see our way to support this contention. It is important to notice that the word "assigns" cannot have its strict legal meaning given to it in the limitation, unless it is attached to the word "heirs," so as to mean *their* assigns.

(1) Co. Rep. 93 b.

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For the survivor of the four sons had no estate in him which he could assign, except his term of ninety-nine years, so that in this limitation one has to recognise that the testator, by using the word "assigns," could not in the ordinary legal sense have meant the assigns of the survivor. This being so, and knowing how often in conveyancing the word "assigns" is unnecessarily used as a word of limitation to shew power of alienation and nothing more, we think it will be doing far less violence to the words used by the testator to construe the limitation to the heirs and assigns of the survivor as being one to the heirs of the survivor and their assigns. And we think that, in the absence in the will of anything to shew that a contrary view should be taken, such a gift as we are dealing with ought to be so construed. In the present case, not only is there nothing in the will to support the contrary view, but there is much to support the view we have expressed. For we find constantly in this will the word "assigns" put in unnecessarily, having no conveyancing virtue at all, and as merely declaratory of a power of alienation in a donee which he would have without it. And, further, with reference to the appellant's contention that in the particular limitation in question the testator meant by using the word "assigns" to give the survivor of the four sons a power of appointment, we find that while elsewhere throughout his will he constantly uses the word "assigns" as a mere conveyancing word and never as meaning "appointees," when he does wish to give a power of appointment he knows how to do it in proper terms and in a proper way. See, for example, the power of appointment given in regard to this Ranscombe property to his nephew Edward Milman to appoint in favour of his sons. And, lastly, it is worthy of observation that this will is obviously a conveyancer's will, and is not the personal product of a testator ignorant of law and using untechnical terms, or obviously using terms which have a technical meaning in an untechnical sense.

It remains to add a few words upon the authorities bearing on the point. In the case of *Tapner* v. *Merlott* (1) there is a

(1) Willes, 177.

dictum of Willes C.J. to the effect that in such a devise as we have here the Court might possibly imply a power of appointment by the use of the word "assigns." But the point does not appear to have been argued before the learned judge, and we gather that he was not supporting any concluded view, but was merely stating an idea that had occurred to him which might possibly be well founded. But in the case of *Quested* v. *Michell* (1) Kindersley V.-C. did undoubtedly, though under special circumstances, hold that a gift in a will of a share of the testator's real and personal estate, after the death of a previous equitable devisee for life, to her heirs, executors, administrators, and assigns, had the effect as to the real estate of giving a power of appointment to her with remainder to her heirs in default of appointment. But we think that that decision depended upon the particular circumstances which that very learned and careful judge had before him. The will in that case is fully set out in the report (2), and when that will is considered it will be seen that there were circumstances which would or might lead to the view that the testator in that particular case did intend the equitable tenant for life to have absolute dominion over her share, subject only to her not being allowed to anticipate the income of the share during her life. The will was dealing with six shares: two were given to devisees absolutely, one was given to a man for life and then to his children absolutely, and the other three shares were given for the benefit of three ladies respectively who were restrained from anticipating the income of their shares. As to these last-mentioned three shares, it was clear that the ladies took an absolute interest in the personalty, subject to their not anticipating the life income, and it might well be supposed that the testator intended them to have a corresponding dominion over the realty, though, as pointed out by the Vice-Chancellor in the report of that case (3), a legal inference to that effect could not be drawn *merely* from the fact of the realty and personalty being dealt with together by the testator. The decision of the Vice-Chancellor was treated as turning on

(1) 24 L. J. (Ch.) 722; 3 W. R. 435. (2) 3 W. R. at p. 435.
(3) 24 L. J. (Ch.) 722; 3 W. R. 435.

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the special circumstances of the will before him in the subsequent case of *Brookman* v. *Smith*. (1) In that case the Court of Exchequer did in fact decide (whether it was necessary for them to do so or not) that a limitation in a settlement after the death of a lady to the use of the heirs and assigns of that lady as if she had died sole and unmarried, did not give her a power of appointment. No doubt that case turned to a great extent on the use of the words "as if she had died sole and unmarried." But *Quested* v. *Michell* (2) was distinguished on the ground above mentioned; and *Brookman* v. *Smith* (1) is an authority to shew that there is no rule that a remainder given to the heirs and assigns of a person who is dead when the remainder takes effect must, in order to give special meaning to the word "assigns," be held to give that person a power of appointment. And it is noticeable that in his argument in reply in that case Mr. Waley says that *Quested* v. *Michell* (2) appears to have been decided with reference to the very peculiar provisions of the will, and is a case which is not supported by other authorities, and is inconsistent with the view generally adopted in practice of an ultimate limitation to "heirs and assigns." Coming from such a source, that observation is not without weight.

The other authorities cited in the course of the argument do not appear to be sufficiently pertinent to the case before us to require special mention. On the authorities as they stand, we think that it is open to us to decide, and that it is right that we should decide, the present case in the manner already indicated. We agree in the judgment of Lawrance J., and think that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiff: *Maddisons, for R. F. Loosemore, Tiverton.*

Solicitors for defendant: *Guscotte, Wadham & Bradbury, for Sparkes, Pope & Thomas, Crediton and Exeter.*

(1) L. R. 6 Ex. 291. (2) 24 L. J. (Ch.) 722; 3 W. R. 435.

W. J. B.

MERCER *v.* LIVERPOOL, ST. HELEN'S AND SOUTH LANCASHIRE RAILWAY COMPANY.

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June 14, 24.

Lands Clauses Act—Notice to Treat—Interest created in other Land subsequently to Date of Notice—Right to Compensation.

Although an interest in land the subject of a notice to treat created subsequently to the date of the notice cannot form the subject of compensation under the Lands Clauses Act, the service of the notice does not disentitle a person, who subsequently acquires an interest in other property of the owner adjoining that which is the subject of the notice, from claiming compensation in respect of injurious affection of that interest.

TRIAL before Lord Alverstone C.J. without a jury.

The following statement of the facts is taken from the judgment of the Chief Justice.

The action was brought by a Mrs. Mercer to recover the sum of 371*l.* 10*s.*, the amount of an award made under the Lands Clauses Act, and the costs subject to taxation of the arbitration. The award was made on March 5, 1897, in respect of the injurious affection of certain leasehold land and houses adjoining Birchley Street, St. Helen's, belonging to the plaintiff. The land in question forms part of the estate of Lord Gerard, and previously to the granting of the lease hereinafter referred to was in his possession as owner. Before the year 1886 certain streets had been laid out and partially constructed, and at the time of the application to Parliament in 1886, hereinafter mentioned, a certain street known as Standish Street was already in existence. Certain other streets communicating with Standish Street, and among others Birchley Street, had already been laid out though not constructed. In the years 1885 and 1886 applications were made to Parliament by the predecessors of the defendant company for powers to construct a railway from St. Helen's to Wigan, and by the St. Helen's and Wigan Junction Act, 1886, s. 4, powers were granted to construct, among others, Railway No. 4, in the township of Windle, commencing by a junction with a certain other line of railway, and terminating at or near the

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intersection of College Street and Corporation Street, which is a short distance to the south of Standish Street. In the passage of that Bill through Parliament an agreement was come to by Lord Gerard and the promoters which was embodied in s. 13 of the Act of 1886. By that section the company became bound within twelve months from the passing of the Act to purchase certain land, indicated upon a certain plan, and the section contained provisions whereby the company were to take the land for, and make, sewer, and flag half of Birchley Street, construct a bridge to carry the railway over Standish Street, and lower the other streets and adjoining building land to correspond with the streets which had to be lowered to be passed under the railway. The Act incorporated the Lands Clauses Act, and s. 21 contained the usual limits of time for exercising the compulsory powers. By an Act of 1889 the twelve months mentioned in s. 13 of the Act of 1886 was extended for one year from July 26, 1889, to July 26, 1890; and by an Act of 1891 the powers of compulsory purchase under the Acts of 1885 and 1886, which had become vested in the defendants, were extended until July 20, 1893. But there was no further extension of the twelve months mentioned in the said s. 13. Prior to the year 1891 nothing had been done by the railway company to carry out the agreement embodied in s. 13 of the Act of 1886. On October 23, 1891, the defendants served upon Lord Gerard a notice to treat to take the land necessary for the railway. The plan annexed to the notice to treat was for the purpose of this case identical with the plan referred to in s. 13 of the Act of 1886. The notice to treat did not refer to s. 13, nor was it in any way given under that section: it was an ordinary notice to treat given by the defendants under their compulsory powers to acquire compulsorily the land shewn upon the plan. On January 12, 1892, Lord Gerard sent in his claim under the notice to treat. This claim was made subject to and upon the basis of the company carrying out the provisions of s. 13 of the Act of 1886. In the month of February, 1892, Lord Gerard's agent agreed with one John Gleave, the predecessor in title of the plaintiff, to let him

certain land on the east side of Birchley Street opposite the land in respect of which notice had been given by the railway company for a term of 999 years. The land was let for the purpose of building. On June 14, 1892, a lease was granted pursuant to that agreement, the term reserved being from January 1, 1892, and the lease contained provisions that the lessees should within twelve calendar months build a certain number of houses upon the land demised. Some of the houses were in fact built during the summer of 1892, and some of those houses were occupied by tenants of Gleave prior to October, 1892. On October 14, 1892, an agreement was made between Lord Gerard and the defendants in respect of the land included in the notice to treat, and under that agreement Lord Gerard agreed to sell the land shewn upon the plan annexed to the notice to treat, a copy of which was also annexed to the agreement, for the sum of 23,000*l.*, such sum to include all satisfaction and compensation for all damages sustained by the vendor by reason of the severing of the property purchased from the vendor from the vendor's other property, or otherwise injuriously affecting such other property by the exercise of the statutory powers. By clause 4 of the agreement the purchase was to be completed on November 30, 1892. The agreement provided by clause 6 that the company should make, sewer, flag, and channel the western half of Birchley Street. The purchase was not completed on the date contemplated. In the year 1893 Lord Gerard commenced proceedings to obtain specific performance of the agreement of October 14, 1892, and subsequently, upon November 27, 1894, a deed of conveyance was executed by Lord Gerard whereby, after reciting that the defendants had agreed with him, the vendor, for the purchase of the land thereinafter conveyed, and among others of the rights conferred by s. 13, sub-s. 3, of the Act of 1886, for the sum of 24,209*l.*, which sum it had been agreed should include all satisfaction and compensation for all damage sustained by the vendor, or by reason of the severance of the property purchased from the vendor's other property, or otherwise injuriously affecting such other property by the exercise of the statutory

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powers, Lord Gerard conveyed the land the subject of the notice to treat to the defendants. Subsequently to October, 1894, the defendants constructed the railway, lowered the level of Standish Street and of the northern end of Birchley Street so as to bring it to the same level at the junction of Standish Street with an upward incline towards the south, and put up a retaining wall to support the plaintiff's houses. The result of these operations by the defendants was that the access to the plaintiff's houses was permanently interfered with. On November 12, 1895, the plaintiff gave a notice claiming compensation for injurious affection under the 68th section of the Lands Clauses Act, and appointed an arbitrator, and, the usual formalities having been observed, the umpire in due course made his award, awarding to the plaintiff the sum of 371*l.* 10*s.* in respect of the damage and injury sustained by the plaintiff in or to her lands, messuages, and hereditaments by reason of the execution of the works of the company, and by reason of such lands, messuages, and hereditaments being injuriously affected.

Jelf, K.C., and *McConkey*, for the plaintiff.

McCall, K.C., *Horridge, K.C.*, and *Lorraine*, for the defendants. It is settled law that an interest in property created by an agreement entered into by the owner after a notice to treat has been served on him is not a subject for compensation under the Lands Clauses Act: *Ex parte Edwards* (1); *Wilkins* v. *Mayor of Birmingham*. (2) Here the notice to treat was in October, 1891, and the agreement for a lease to Gleave was not till February, 1892. If after the date of the notice Lord Gerard had built the houses himself, he could not have thereby increased the burden to be borne by the railway company; and if he could not do so himself, neither could he give to another person the power of imposing the additional burden.

Jelf, K.C., in reply. The principle of *Ex parte Edwards* (1) is confined to dealings with the land which is the subject of the notice to treat. It does not restrict the landowner's right to

(1) (1871) L. R. 12 Eq. 389. (2) (1883) 25 Ch. D. 78.

deal with other land of his which may be injuriously affected by the works sought to be authorized.

Cur. adv. vult.

LORD ALVERSTONE C.J., after stating the facts as above set out, proceeded as follows:—It was not disputed that the lowering of the road and the interference with the access to the plaintiff's houses did cause an injurious affection which would, under ordinary circumstances, entitle the plaintiff to compensation. This has been for a long time settled; but it was said that either the provisions of s. 13 of the Act of 1886, or the giving of the notice to treat on October 23, 1891, coupled with the payment to Lord Gerard of the compensation in pursuance of the agreement, prevented the plaintiff from being entitled to recover compensation in respect of the injurious affection of the land demised to Gleave under the lease of June 14, 1892. In my opinion no argument can properly be founded by the defendants upon the statutory bargain contained in s. 13 of the Act of 1886. That bargain was never carried out. The lands were not purchased under the agreement therein contained. The powers of the company for carrying out that bargain expired on July 26, 1890. The land was in fact purchased under the compulsory powers contained in the Act of 1886, the time for the exercise of those powers having been extended by s. 3 of the Act of 1891.

The question, therefore, to be determined is, Did the transaction between the company and Lord Gerard, founded upon the notice to treat of October, 1891, disentitle the plaintiff to the right of compensation which would otherwise have existed? It is well established that no compensation can be claimed in respect of an interest in land the subject of a notice to treat created subsequently to the date of the notice: *Ex parte Edwards* (1); *Wilkins* v. *Mayor of Birmingham* (2); *Todd* v. *Metropolitan District Ry. Co.* (3), and other cases. The argument of the defendants in this case, however, goes further. It is contended by them that after the service of the notice to

(1) L. R. 12 Eq. 389. (2) 25 Ch. D. 78.
(3) (1871) 24 L. T. (N.S.) 435.

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treat, either taken alone or in conjunction with s. 13 of the Act of 1886, no owner of any interest in property created by Lord Gerard after the date of the notice could make any claim for compensation for any injurious affection sustained by any such property in consequence of the construction of the works authorized by their parliamentary powers. In my opinion this contention is not well founded. There are many reasons why the principle that an interest cannot be created in the land the subject of the notice to treat should not be extended in the way suggested. The notice to treat does not determine the amount of compensation for the land taken, or the amount to be paid for injurious affection. It does fix and stereotype the interest which the company desire to acquire; but the amount to be paid is the subject of subsequent agreement, or, it may be, of assessment by a jury or arbitrators. Between the time when the notice to treat is given and the damages are actually assessed, a landowner may, as far as I know, deal with his adjoining lands. There is no statute or principle to restrain him from so doing, and when the amount to be paid is ascertained, whether by agreement or judicial proceedings, the real nature of the injury by severance or injurious affection has to be considered. The vendor may since the notice to treat have ceased to own other parts of his property. No doubt, if it could be shewn that the vendor, with the consent of the person claiming the subsequent interests under him in lands other than those taken, had claimed and received compensation in respect of those interests, it might raise the case which has sometimes been made that the vendor received less for his interests in the other land from the persons acquiring them, because he intended to claim and receive compensation to recoup him for accepting a lower price from the persons acquiring the interests. In my opinion, however, any such case would have to be established by evidence, and does not flow as a legal deduction from the mere fact that a notice to treat has been given for land other than that out of which the interests have been created. I may observe that by their defence the defendants properly raised an issue on this point. In this case the defendants have not adduced any evidence

that in fixing the purchase-money ultimately paid to Lord Gerard anything was included for the damage to the property leased to the predecessors of the plaintiff by the lease of June, 1892. It is true that the agreement of October 14, 1892, speaks of compensation for injurious affection of the other property of the vendors. At the time that agreement was made the lease was in existence. The houses were already built fronting upon Birchley Street, and, in my opinion, it was for the defendants to prove that some claim was made or item included in respect of the then existing land and houses which now belong to the plaintiff. There is no evidence that Gleave had any notice or knowledge of the fact that the notice to treat was served on Lord Gerard in October, 1891. He must be deemed to have known of the provisions of s. 13 of the Act of 1886; but, as I have already said, the land was not taken under that section, but under the ordinary compulsory powers. Evidence was given that the solicitors for the railway company did not know of the lease of June, 1892, when they made the agreement of October; but, in my opinion, that is immaterial in the absence of any evidence that a claim was being made or included in respect of the injurious affection of the land and houses in question which formed no part of the property taken. Moreover, I am by no means satisfied that the extent to which Birchley Street would have to be lowered was then known, or that the nature of the works which the defendants would have to execute to secure the plaintiff's property was known. Sect. 13 of the Act of 1886 contemplated the possible lowering of Standish Street and Birchley Street to some extent, but I do not know that the actual degree of lowering could be ascertained until the railway was constructed, still less what works would be required to be carried out in connection therewith. The main ground on which I have decided in favour of the plaintiff is that, in my opinion, the service of the notice to treat does not prevent the owner of the property to which the notice to treat relates dealing with property other than that included in the notice, and that persons who bonâ fide acquire interest in such other property are not deprived of their claim to compensation for

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injurious affection by works subsequently executed simply because the defendants have made a settlement with the vendor in respect of the land taken and injurious affection of his other property. As I have indicated, a great deal more requires to be shewn before the right of compensation, otherwise admitted, can be taken away. I have assumed in favour of the defendants that the amount of 24,209*l.* paid under the conveyance of 1894 included the 23,000*l.* the subject of the agreement of October, 1892. It was contended on behalf of the plaintiff that I ought not to take this view; but, having regard to the recital in the deed of 1894 to which I have referred, I think that is established.

Judgment for the plaintiff.

Solicitors for plaintiff: *Bell, Brodrick & Gray, for J. Haslam Fox, St. Helen's.*

Solicitors for defendants: *Maples, Teesdale & Co., for Oppenheim & Malkin, St. Helen's.*

J. F. C.

HERBERT, APPELLANT; McQUADE, RESPONDENT. 1901 *May* 9.

Revenue—Income Tax—Public Office or Employment of Profit—Incumbent of Benefice—Perquisites or Gains accruing by reason of Office—Grant by Affiliated Branch of Queen Victoria Clergy Sustentation Fund—Income Tax Acts, 1842 (5 & 6 *Vict. c.* 35), *s.* 146; 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Sched. E.*

The appellant, a beneficed clergyman, received for several years an annual charitable grant of money from one of the diocesan branches affiliated to the Queen Victoria Clergy Sustentation Fund, which is a body incorporated with the object of giving pecuniary assistance to poor clergymen holding benefices. The funds of the diocesan branch were administered by a council under rules which provided that no assistance should be given where the income of the applicant's benefice exceeded 200*l.* a year, or where, though the income of his benefice did not exceed that sum, he was not a poor man, and that the onus should rest upon the applicant of deciding whether his own circumstances justified him in applying for charitable assistance out of the funds. The giving, withholding, continuance, or discontinuance at any time, of grants out of the funds were matters wholly within the discretion of the council:—

Held, that the sums received by the appellant from the diocesan branch were not "perquisites or profits accruing by reason of" his office within the meaning of the first rule, contained in s. 146 of the Income Tax Act, 1842, for charging duties under Sched. E, and therefore that he was not liable to pay income tax in respect of those sums.

CASE stated by Commissioners of Income Tax.

1. At a meeting of Commissioners for the general purposes of the Income Tax Acts for the division of Norwich City, held at Norwich, the Rev. G. N. Herbert appealed against the assessments of 65*l.* made upon him, under Sched. E of the Income Tax Acts, for each of the two years ending April 5, 1900, and April 5, 1901, respectively.

2. The appellant is vicar of the parish of St. John de Sepulchre, in the city of Norwich, and the assessments made upon him are in respect of sums of that amount granted to him by the Queen Victoria Clergy Sustentation Fund (Norwich Diocese), hereinafter referred to as the Norwich Diocesan Branch.

3. The Queen Victoria Clergy Sustentation Fund was

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established and incorporated by charter in the year 1897, and is hereinafter referred to as the central fund. The Norwich Diocesan Branch is affiliated to the central fund, but is controlled by the local diocesan council, which reserves to itself the entire control over the apportionment and distribution of grants, and the right to consider all the circumstances of the cases for which petitions are made.

Copies of the annual reports of the Norwich Diocesan Branch for the years 1897, 1898, 1899, and 1900, and of the charter and regulations, and the annual reports of the central fund for the years 1897, 1898, 1899, and 1900, are hereto annexed and form part of this case. The statements and facts appearing in these documents are to be deemed to be applicable to this case, and the grants in question are made in the circumstances and subject to the conditions as therein set out.

[The charter of incorporation of the Queen Victoria Clergy Sustentation Fund declared the object and purposes of the corporation to be limited to the provinces of Canterbury and York, and to be (inter alia) as follows: "To supplement and extend the diocesan organisations for the support of the clergy; to elicit contributions for this purpose from the richer to the poorer dioceses, and generally to promote the further sustentation of the clergy:—

"In particular, but not by way of restriction—

"To promote the establishment and maintenance in every diocese of a diocesan organisation for the sustentation of its clergy;

"To establish and maintain a central fund for the sustentation of the clergy;

"To encourage diocesan organisations to affiliate themselves to the corporation on condition of paying contributions to the funds of the corporation."

For the purposes of the charter the corporation were empowered (inter alia) to acquire and hold real and personal property; to receive and administer the contributions from the affiliated diocesan organisations, and all general and special contributions, subscriptions, and bequests towards the funds of the corporation and the objects of the charter, and to make

and apportion grants from the funds so held, administered, collected, or received, either directly, or by delegating such power to any diocesan or other organisation.

The 18th of the regulations made under the charter provides that the council shall, out of their annual income, "make annual grants to such of the affiliated diocesan organisations as may appear to them in their discretion to require help," upon the terms that "the sums granted shall not be capitalised as a provision for permanent endowment, but shall be applied in augmentation of the income of benefices, where required, in such manner as the diocesan organisations shall from time to time in their discretion think fit."]

4. The primary object of the central fund is to obtain from church people the necessary funds for providing adequate remuneration for the beneficed clergy.

The fund is intended to aid—

(1.) In raising those incomes of benefices which are normally very small;

(2.) In making up those incomes of benefices which have suffered reduction owing to agricultural or other causes;

(3.) In raising those incomes of benefices which are nominally of substantial value, but which, owing to the large population and consequent claims on the incumbents, are insufficient.

The fund receives contributions for—

(1.) The general fund (for annual grants to benefices);

(2.) For the permanent endowment or increase of endowments of benefices;

(3.) For special specified objects.

The aim of the Norwich Diocesan Branch is to raise the incomes of all benefices under 200*l.* a year (net) up to that amount, and grants are made upon applications received from incumbents, and in apportioning such grants to benefices the council take into consideration the population, duties, work, and all the claims upon the incumbent of the parish. A local contribution is required from assisted parishes. Grants are not necessarily made in respect of all benefices not exceeding 200*l.*

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per annum; nor does the receipt of a grant guarantee its continuance beyond the year for which it is made. An incumbent receiving a grant is only entitled to it for such portion of the year as he shall fill the office of the benefice, and when a benefice falls vacant in the course of a year for which a grant is made, it is divided between the outgoing and incoming incumbent in proper proportion to the length of time during the year for which each has been incumbent.

[The report (1897) of the executive committee of the Queen Victoria Clergy Sustentation Fund stated: "The fund is not intended to be an additional clerical charity, but aims at providing a fair remuneration for work done."

The report (1900) of the council of the Norwich Diocesan Branch stated: "The diocesan council reserves to itself the entire control over the apportionment and distribution of grants, and the right to consider all the circumstances of the case for which petitions are made. They are given to benefices with net incomes of 200*l.* a year and under, and in apportioning them the population, duties, work, and all the claims upon the incumbent of the parish are considered. The receipt of a grant will furnish no guarantee of its continuance beyond the year in which it is made; nor will the declining of a grant by any incumbent preclude him from applying for assistance in any future year. The onus rests on each incumbent to decide whether his own circumstances really justify him in applying for the benefit of this fund."]

5. The funds of the Norwich Diocesan Branch are obtained from subscriptions, donations, collections, church offertories, and grants from the central fund. In order to obtain a grant from the central fund one-fifth of the amount raised annually in the diocese is paid as an affiliation fee to the central fund.

6. The parish of St. John de Sepulchre, in the city of Norwich, of which the appellant is the incumbent, is a large populous parish with a poor population, and the work entailed in fulfilling the duties of the office of incumbent is arduous. The net income of the benefice is less than 200*l.* per annum.

7. The appellant as incumbent of the benefice of St. John de Sepulchre has applied for and received a grant from the

fund each year since its institution in 1897—namely, 1897, 1898, 1899, and 1900.

The Commissioners having heard and considered the appeal, and the contentions on behalf of the appellant and the surveyor, were of opinion that the sums comprised in the assessments were chargeable under s. 2 of 16 & 17 Vict. c. 34, or under the first or fourth rules of s. 146, Sched. E, of 5 & 6 Vict. c. 35, or otherwise, as accruing by reason of the office of the appellant (1), and they confirmed the assessments.

Danckwerts, K.C. (*F. Low* with him), for the appellant. The Commissioners were wrong in confirming the assessment. The income tax is a tax imposed, as the title to the Income Tax Act, 1853, indicates, on "profits arising from property, professions, trades and offices." Sect. 2 also shews that "properties, profits, and gains" are intended to be the subjects of taxation in the various schedules. The words "perquisites or profits"

(1) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 146: "The duties hereby granted, contained in the schedule marked E, shall be assessed and charged under the following rules, which rules shall be deemed and construed a part of this Act, and to refer to the said last-mentioned duties as if the same had been inserted under a special enactment.

"Schedule E.

"Rules for charging the said duties.

"1st. The said duties shall be annually charged on the persons respectively having, using, or exercising the offices or employments of profit mentioned in the said Sched. E, or to whom the annuities, pensions, or stipends mentioned in the same schedule shall be payable, for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices, employments, or pensions. . . . .

"4th. The perquisites to be assessed under this Act shall be deemed to be such profits of offices and employments as arise from fees or other emoluments, and payable either by the Crown or the subject, in the course of executing such offices or employments, and may be estimated either on the profits of the preceding year, or of the fair and just average of one year of the amount of the profits thereof in the three years preceding. . . . ."

The schedule of charge now in force is contained in the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2.

"Schedule E.

"For and in respect of every public office or employment of profit, and upon every annuity, pension, or stipend payable by Her Majesty or out of the public revenue of the United Kingdom, except annuities charged to the duties under the said Sched. C, and to be charged for every twenty shillings of the annual amount thereof."

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in the first rule for charging duties under Sched. E are the only words which could be capable of including the payments to the appellant in question; but those payments are not perquisites or profits within the meaning of that rule. They do not "accrue" to the appellant "by reason of" his office, nor are they within the definition of "perquisites" in the fourth rule, because they are not profits of his office. They are payments made to the individual, and are only made at discretion, and if certain conditions personal to himself are shewn to exist. In *Inland Revenue* v. *Strang* (1) the Lord Ordinary (Lord Curriehill) held that a gift of money, made three years in succession to a clergyman of the Established Church by his friends, was a payment made to him in respect of his office as a clergyman, and therefore chargeable with duty. That decision, however, was given without any argument on behalf of the person sought to be taxed, and it ought not to be followed. In *Turner* v. *Cuxon* (2) the Court held that a curate was not chargeable with income tax in respect of a grant from the Curates' Augmentation Fund. Lord Coleridge, though he distinguished *Inland Revenue* v. *Strang* (1), said that he should have felt himself bound to differ from that decision had the case been the same as the one then before him. The meaning of the term "profits" as used in the Income Tax Acts is dealt with in the judgments given in the House of Lords in *Tennant* v. *Smith* (3) and *Gresham Life Assurance Society* v. *Styles* (4), which shew that the term is used in its natural sense as a business man would understand it. If the funds of the central body here were invested in Consols the income in the hands of the corporation would be exempted from assessment under Sched. C, as being the income of stock held by a corporation established for charitable purposes only (Income Tax Act, 1842, s. 88, Third Rule). It was not the intention of the Income Tax Acts that income received to be applied for charitable purposes should be the subject of taxation.

Sir Robert Finlay, *A.-G.* (*Sir Edward Carson*, *S.-G.*, and

(1) (1878) 15 Sc. L. R. 704; 1 T. C. 207 (reported sub nom. *In re Rev. George Walter Strong*).

(2) (1888) 22 Q. B. D. 150.

(3) [1892] A. C. 150.

(4) [1892] A. C. 309.

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S. A. T. Rowlatt with him), for the Crown. The appellant is liable to pay income tax in respect of these sums granted to him. They come within the words "salaries, perquisites, or profits." They are payments which "accrue" to him in respect or "by reason of" his office. If they so accrue, it is not necessary that there should be any legal right to them. Many instances may be given, as that of a barrister and his fees, in which, though there is no legal right to recover sums, the person who receives them is liable to income tax in respect of them. In *Partridge* v. *Mallandaine* (1) a bookmaker was held liable to pay income tax in respect of the profits of his business. The term "accrue" is used in the sense of "augment" or "add to." When the income derived from an office is augmented, or added to, by periodical payments, then those payments "accrue by reason of" the office within the meaning of the Act. The facts stated in the case, and the various reports which are made part of it, establish that the payments here were payments to the benefice. They are so referred to in those reports; and, in the case of an incumbent leaving his benefice, the annual payment may be apportioned between the outgoing and incoming incumbents. The fact that a certain discretion is left to the corporation does not alter the nature of the payments. The case of *Inland Revenue* v. *Strang* (2) is in point. So far as the Lord Ordinary referred to Sched. D, his decision no doubt was wrong in view of the judgment of the House of Lords in *Tennant* v. *Smith* (3), but he was right as to Sched. E. In *Turner* v. *Cuxon* (4) the ground of the decision was that the payment was not made to the curate as curate, but as a reward for good work done for many years. In that case Lord Coleridge C.J. did not expressly dissent from *Inland Revenue* v. *Strang* (2), but distinguished it. Sect. 52 of the Income Tax Act, 1853, deals with the receipt by clergymen of "profits, fees, or emoluments," and enables them to deduct therefrom, for the purposes of assessment to the income tax, expenses incurred in the performance of their duties. The Act,

(1) (1886) 18 Q. B. D. 276.
(2) 15 Sc. L. R. 704; 1 T. C. 207 (reported sub nom. *In re Rev. George Walter Strong*).
(3) [1892] A. C. 150.
(4) 22 Q. B. D. 150.

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therefore, recognises that there may be additional emoluments which may be the subject of the tax.

Danckwerts, K.C., was not called on to reply.

KENNEDY J. I am of opinion that this appeal ought to succeed. The material facts are these: The appellant is the vicar of a poor parish in the city of Norwich. An assessment has been made upon him in respect of sums granted to him by a charitable institution, the Queen Victoria Clergy Sustentation Fund. That fund was established in 1897 under a charter of that year, and the Norwich Diocesan Branch is affiliated to it in the way which appears in the documents which are made part of the case. For the purposes of to-day it is only necessary to say that the diocesan branch can and does make grants or gifts from time to time to poor clergymen in the diocese, if those who have the government of the branch are satisfied that a case for charitable assistance is made out. They reserve to themselves the entire control over the apportioning and distribution, and the right to consider all the circumstances where a request for charitable assistance is made to them. They may make grants for permanent endowment, or for the increase of endowment, or for special objects, and in each case they consider the merits of the applicant. No grant can be made unless one condition be satisfied—namely, that the applicant's income as a clergyman in the diocese should not exceed a certain sum. If he be a rich man holding a poor living, he gets no grant; they will not give him assistance merely on the ground that the living is a poor one. They may give a certain sum one year, a less sum in another year, and in another year they may feel themselves bound to refuse any assistance at all. It is entirely in their discretion, to be exercised under the particular circumstances of the case, whether they do or do not give; and if they do, what sum they give. It is said that, as they have for several years given the appellant a certain sum in the present case, he is liable to pay income tax upon that sum under Sched. E. It is sought to charge him under the words "for all salaries, fees, wages, perquisites, or profits whatsoever

accruing by reason of such offices, employments," &c. Now, I am not satisfied that the sums which were received by the appellant from the Norwich Diocesan Branch come under any of these heads. I am not at all sure that they can be treated as salaries, fees, wages, perquisites, or profits; but I prefer to base my judgment upon the ground that they are payments which did not accrue to him by reason of his office. It appears to me that it was not by reason of his holding the office in any proper sense of the words that he got these payments. It is a condition of his receiving any such payment that he should be a clergyman holding office. It is also a condition that he should himself be poor, and that the emolument of his office should not exceed a certain sum. All that can be said is that by reason of his holding the office he had the opportunity of becoming an object of this charity—of receiving from a charitable institution a gift uncertain in amount, and at uncertain times, according to the discretion of those who administer the charity; but, in saying that, you are not, in my opinion, saying enough to describe him, in the plain words of the statute, as a person to whom the payment has "accrued by reason of" his office. He might have held the office of a clergyman in this parish all his life without receiving any gift or payment at all from this charitable institution. He received it because he was a poor man, and his emolument was less than a certain sum; but, so far as his holding the office of a clergyman is concerned, you can only say that it gave him the opportunity of being considered by those who might, if they chose, make a gift to him from the charity. That is the ground of my judgment, and I do not think that the decisions cited to us, if fairly read together, afford any ground for coming to a different conclusion. As to the decision in *Inland Revenue* v. *Strang* (1), which counsel for the Crown relied on, I confess, with deference, that I should have felt great difficulty in deciding that case as the Scottish Court did. Although any decision of Lord Curriehill's is entitled to great respect, one cannot lose sight of the fact that the case was only argued on

(1) 15 Sc. L. R. 704; 1 T. C. 207 (reported sub nom. *In re Rev. George Walter Strong.*)

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one side—namely, for the Crown, who succeeded, and that there was no argument for the appellant. Further, the Lord Ordinary apparently came to the conclusion that the tax was payable either under Sched. E or under Sched. D, and according to a more recent decision—*Tennant* v. *Smith* (1) in the House of Lords—it would seem that in that respect his conclusion was erroneous. The facts in *Inland Revenue* v. *Strang* (2) were that a congregation, in token of their regard for their minister, had made a gift of 100*l.* to him at Christmas time for about three years, the sum being raised by voluntary subscriptions, and there being no obligation whatsoever to repeat the gift. Looking at these facts, I confess that I should have thought that a different decision would have been the correct one, if the case had come before me. The judgment, however, is not binding upon us, and it may be that the case is distinguishable upon the ground stated by the Court in *Turner* v. *Cuxon.* (3) They certainly did not follow *Inland Revenue* v. *Strang.* (2) Each case must depend upon its particular circumstances, as the Attorney-General admitted; and, notwithstanding the words to which we were referred in the Report of 1900, the grant here was, I think, in no sense a grant to the benefice or office, but to the person, and a grant dependent upon personal qualifications, which are not recognised as a matter of right, or for any determinate period, the recognition being only at the will and discretion of those who make the grant. I see nothing which justifies us in saying that there has been a salary, wage, profit, fee, or perquisite which has accrued to the appellant by reason of his office within the meaning of the Act. I am, therefore, of opinion that he is entitled to our judgment.

PHILLIMORE J. I am of the same opinion. The Crown have to make out their claim to income tax, and they are limited by the words of the statute. They must establish that the sums given to the appellant by the Norwich Diocesan Branch are salary, fees, wages, perquisites, or profits accruing

(1) [1892] A. C. 150.
(2) 15 Sc. L. R. 704; 1 T. C. 207 (reported sub nom. *In re Rev. George Walter Strong*).
(3) 22 Q. B. D. 150.

to him by reason of his office. It has not been contended that they are "fees" or "wages," and I cannot see that they come under the head "salaries." If they are to be brought within the statute at all, the sums must be "perquisites" or "profits," and they must be payments which accrue by reason of the office, and are periodical—I do not say annual. I doubt whether the word "profits" has a larger meaning than the word "perquisites." I think that the fourth rule for charging duties under Sched. E shews either that "perquisites" means the same thing as profits, or that the profits are to be ascertained in the same way as perquisites. Having regard to the fourth and other rules, it also seems to me that the word "accrue" is intended to be conterminous with the word "payable." "Accrue" is in itself a word of very wide and general meaning, and neither in its etymological nor in its ordinary sense would it, I think, help the Crown in the present case. But if we put the word "accrue" aside and take the more defined word "payable" the matter becomes reasonably clear. The words in the fourth rule are, "payable either by the Crown or the subject." That, of course, does not mean legally recoverable in the sense of being recoverable by an action at law, because the Crown cannot be sued by action, but it must mean legally to be paid—not payable as of grace or favour, or arbitrarily, or capriciously, but legally to be paid either by the Crown or by the subject. That interpretation is made still clearer by looking at the seventh, eighth, and tenth rules; and the language of s. 53 of the Income Tax Act, 1853, points in the same direction. Therefore, if I am right, the first condition to be fulfilled is that these perquisites or profits should be by law due, and it is obvious that the grant to the appellant from the Norwich Diocesan Branch of the Queen Victoria Clergy Sustentation Fund is not a grant which is by law due to him. I should be prepared to rest my judgment upon that ground only, but I agree that the second point is the stronger. The perquisite or profit must accrue by reason of the office. I entirely agree with my brother Kennedy that the payment to the appellant here does not accrue by reason of his office; the office is merely a condition sine quâ non, or,

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to use my brother Kennedy's phrase, which I cannot better, it creates the opportunity of receiving the payment. I will add, with respect to the condition that the payment must be periodical, that although it be true that the appellant has for three years running received this particular grant, it is purely accidental whether he will receive it again. With regard to the two authorities cited which bear on the question we have to decide, I should myself be inclined to put aside *Inland Revenue* v. *Strang* (1) on the ground that it was decided without any argument on behalf of the party against whom the judgment went. I have always protested against carrying our worship of precedent so far as to rest upon authorities which have been decided without full argument. I think myself that they should never be reported, except in those rare cases where the Court below has decided in one way, and on appeal the decision has been reversed, but the respondent has not appeared to have his case argued. When that happens it is necessary to report the decision of the Court of Appeal as being the antidote to the bane of the decision below. I am prepared to say that I should attach no weight to the Scotch case, as I should attach no weight to a decision of my own which had unfortunately to be given against a man who did not come and have his case argued before me. I respectfully do not agree with the Scotch case. I think it is, as the Attorney-General said, a stronger case than the present and a stronger case than *Turner* v. *Cuxon*. (2) I see no real distinction between the present case and *Turner* v. *Cuxon*. (2) The report of the council of the Curates' Augmentation Fund was made part of the case. I know how that fund works, and I know that Lord Coleridge C.J. knew particularly well how it worked, and I see no real distinction between the working of that fund and this. The distinction that in *Turner* v. *Cuxon* (2) the recipient of the charity had to be an assistant curate, whereas here he has to be a beneficed incumbent, is a distinction without a difference. We have had the present case discussed as if it were res nova, and we give judgment upon it after hearing full

(1) 15 Sc. L. R. 704; 1 T. C. 207 (reported sub nom. *In re Rev. George Walter Strong*).

(2) 22 Q. B. D. 150.

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argument on both sides; but I may add that if, apart from *Turner* v. *Cuxon* (1), I had arrived at a conclusion contrary to that which I have arrived at, I should have felt myself bound by that decision. I will make one other observation. This is an unsavoury case. One cannot help seeing that there has been an attempt to wrest a tax out of this public benevolence. It is pressed against a poor and particularly helpless man, and it is only the accident that there is a numerous class of men equally poor and helpless which has enabled him to resist what we have found to be an unfounded claim put forward by the officers of the Crown.

Judgment for the appellant.

Solicitors for appellant: *Crowders, Vizard & Oldham, for Mills & Reeve, Norwich.*

Solicitor for the Crown: *Solicitor of Inland Revenue.*

W. A.

THE ATTORNEY-GENERAL *v.* THE MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF EASTBOURNE.

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May 10.

Revenue—Stamp Duty—Property Purchased under Statutory Power—Production of Instrument of Conveyance—Duty on Transfer of Personal Property—Finance Act, 1895 (58 & 59 *Vict. c.* 16), *s.* 12.

Sect. 12 of the Finance Act, 1895, provides that, where by virtue of any Act any person is authorized to purchase property, he shall, within a specified time, produce to the Commissioners of Inland Revenue an instrument of conveyance of the property duly stamped with the ad valorem duty payable upon a conveyance on sale of the property:—

Held, that s. 12 applied to personal as well as real property; so that, where goods and chattels were included in property purchased under statutory authority, an instrument of conveyance must be produced stamped with the ad valorem duty in respect of the whole of the property so purchased.

SPECIAL CASE, stated by consent under Orders XXXIV., r. 1, and LXVIII., r. 2, in the matter of an information on behalf of the Crown.

(1) 22 Q. B. D. 150.

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1. This is an information on behalf of the Crown to recover 443*l.* 15*s.* and interest for duty claimed under s. 12 of the Finance Act, 1895 (1), in respect of a purchase of property by the defendants under statutory powers as hereinafter mentioned.

2. On April 19, 1899, an agreement was entered into between the Eastbourne Electric Light Company, Limited (hereinafter called the company), and the defendants (hereinafter called the corporation).

3. It was recited in that agreement that the company, under the Eastbourne Electric Supply Order, 1890, confirmed by the Electric Lighting Order Confirmation (No. 8) Act, 1890, had acquired land and erected lighting works and provided plant, machinery, mains, and other appliances, and had been supplying electrical energy within the area specified in that order.

4. Clause 1 of the agreement was as follows: "Subject to the provisions hereinafter contained the company will sell and the corporation will buy the whole of the undertaking of the company under the said order, and all the powers, rights, and privileges thereby conferred on the company, together with the full benefit of all pending contracts and engagements to which the company are or may be entitled in connection with the said undertaking. Together with the freehold piece of land and the building erected thereon situate in Junction Road, Eastbourne, aforesaid, with all the works, engines, and fixed

(1) Finance Act, 1895 (58 & 59 Vict. c. 16), s. 12: "Where after the passing of this Act, by virtue of any Act, whether passed before or after this Act, either—

"(*a*) any property is vested by way of sale in any person; or,

"(*b*) any person is authorized to purchase property;

such person shall within three months after the passing of the Act, or the date of vesting, whichever is later, or after the completion of the purchase, as the case may be, produce to the Commissioners of Inland Revenue a copy of the Act printed by the Queen's printer of Acts of Parliament or some instrument relating to the vesting in the first case, and an instrument of conveyance of the property in the other case, duly stamped with the ad valorem duty payable upon a conveyance on sale of the property; and in default of such production, the duty with the interest thereon at the rate of five per cent. per annum from the passing of the Act, date of vesting, or completion of the purchase, as the case may be, shall be a debt to Her Majesty from such person."

and movable plant and machinery, wires, cables, pipes, instruments, utensils, tools, and all other goods, chattels, and effects belonging to the said company which now are or shall at the time of completion of the said purchase be used and provided by the company for the purposes of the said undertaking, save and except all depreciation and other reserve funds, cash balances, books, and other debts, earnings, rights, and credits belonging or due to the company at the time of such completion, and the company's books and papers and the furniture of their board-room."

5. By clause 2 it was agreed that the consideration for the purchase should be the sum of 82,135*l.*, in addition to the sums thereinafter and hereinafter mentioned; provided always, that if the corporation agreed to take into their employment either the manager or secretary of the company upon such terms as should be agreed upon between the corporation and the manager and secretary respectively, then the corporation should be entitled to deduct from the purchase-money the sum of 2000*l.*, in the proportion of two-thirds thereof in respect to the manager and one-third thereof in respect to the secretary, so agreed to be taken into the employment of the corporation, for the loss of office. The corporation did not take either the manager or the secretary into their employment, and no part of the 2000*l.* became deductible.

6. By clause 3 it was provided that the purchase should be completed, and the purchase-money paid, on January 1, 1900, on which day the company would convey their freehold premises to the defendants, and also assign or deliver over to them all the remainder of the premises agreed to be sold.

7. By clause 4 the company were to carry on the undertaking as a going concern until the day of completion; and by clause 5 the defendants were to pay for all new plant and machinery provided since December 21, 1898, and for certain additional capital outlay which might be incurred by the company before completion. The amount which became payable under this provision was 6614*l.* 2*s.* 9*d.*

8. Of the two sums of 82,135*l.* and 6614*l.* 2*s.* 9*d.*, together making 88,749*l.* 2*s.* 9*d.*, the consideration for the sale as

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aforesaid, 37,929*l.* was in respect of goods, wares, and merchandise.

9. By s. 3 of a provisional order, subsequently granted by the Board of Trade under the Electric Lighting Acts, 1882 and 1888, to the defendants, it was provided that the order should not come into force or have effect, notwithstanding the confirmation by Parliament, until such date as the Board of Trade should fix, and that the Board of Trade should fix a date for the commencement of the order when they were satisfied that the undertakers had completed the purchase of the undertaking of the Eastbourne Electric Light Company, Limited, in accordance with the agreement of April 19, 1899, or any further agreement made between the company and the undertakers necessary or expedient for enabling the original agreement to be carried into effect, and that "the undertakers shall have power to buy, and the Eastbourne Electric Light Company shall have power to sell, the undertaking of the company in conformity with this section, and for that purpose this order shall come into force and have effect on the day when the Act confirming this order is passed."

10. By s. 4 it was provided that the undertakers for the purposes of the order should be the defendants.

11. By s. 2 of the Electric Lighting Orders Confirmation (No. 19) Act, 1899, passed on July 13, 1899, the above-mentioned provisional order was confirmed, and it was enacted that all the provisions thereof should from and after the passing of the Act have full validity and effect.

12. The purchase provided for by the agreement of April 19, 1899, was duly completed on January 1, 1900, payment of the purchase-money being made, as to 88,135*l.*, on that day, and as to the balance, 614*l.* 2*s.* 9*d.*, on February 27 following. It is to be taken that the defendants have been always ready and willing to produce to the Commissioners of Inland Revenue an instrument of conveyance stamped with ad valorem duty upon the consideration excluding the 2000*l.* in paragraph 5 hereof mentioned, and excluding the 37,929*l.* in respect of goods, wares, and merchandise in paragraph 8 hereof mentioned; and that, if the production of such a conveyance so stamped would

have been a compliance with the requirements of s. 12 of the Finance Act, 1895, the defendants have committed no default. Save as aforesaid, no conveyance has been produced under that section.

13. The agreement and provisional orders and Acts referred to, and the conveyance and correspondence between the Commissioners of Inland Revenue and the defendants, were made part of the case.

14. The Attorney-General contends that by virtue of the Electric Lighting Orders Confirmation (No. 19) Act, 1899, confirming the provisional order granted to the defendants as hereinbefore mentioned, the defendants were authorized to purchase the property comprised in the agreement of April 19, 1899, and were therefore bound within three months of the completion of the purchase to produce an instrument of conveyance of the whole of the property, including chattels, duly stamped with the ad valorem duty payable upon a conveyance on sale of such property—that is to say, with a duty of 443*l.* 15*s.*, or 5*s.* for every 50*l.* of the sum of 88,749*l.* 2*s.* 9*d.*, the whole of which sum the Attorney-General contends to be consideration for such sale. The Attorney-General further contends that under the circumstances a default has been made within the meaning of s. 12 of the Finance Act, 1895, and that the duty claimed, with interest at 5 per cent. from the date of completion, is a debt due to His Majesty from the defendants.

15. The defendants contend :—

(1.) That no duty is payable on the sum of 37,929*l.* mentioned in paragraph 8 hereof.

(2.) That no duty is payable on the sum of 2000*l.* mentioned in paragraph 5 hereof.

The question for the Court is, whether ad valorem duty on so much of the consideration as represented goods, wares, and merchandise, namely, 37,929, and on the sum of 2000*l.* referred to in paragraph 5 hereof, is recoverable or not. If the decision is in the affirmative on either or both points, judgment is to be entered for the Crown for the amount recoverable with interest. If the decision is in the negative on either or both points,

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judgment is to be entered for the defendants upon that point or points.

Sir Edward Carson, S.-G. (*S. A. T. Rowlatt* with him), for the Crown. There is no ground for the contention that stamp duty is not payable on the consideration paid by the defendants for the personal property purchased by them from the Eastbourne Electric Light Company, Limited. The defendants, by the Act confirming their provisional order, were authorized to purchase all the property, real and personal, which was the subject of the agreement of April 19, 1899. They are, therefore, brought within the terms of s. 12 of the Finance Act, 1895, and ought to have produced an instrument of conveyance of the whole of that property duly stamped with the ad valorem duty in respect of the whole consideration for the sale. By the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 1, and Sched. I, the ad valorem stamp duty is imposed in respect of "the conveyance or transfer on sale of any property," except stocks.

As to the 2000*l.*, it clearly became part of the consideration for the sale if the defendants elected not to take the manager and secretary of the company into their employment. [He referred to *Royal Insurance Co.* v. *Watson.* (1)]

Macoun, for the defendants. The "property" of which an instrument of conveyance is required to be produced by s. 12 of the Finance Act, 1895, is property for the passing of which an instrument of conveyance is necessary. The section does not apply to personal property which can be passed by delivery. If the contention for the Crown were well founded, the corporation in the present case would have to produce an instrument of conveyance if they bought a single water-cart, because their only authority to buy any kind of property is statutory. The Act imposes no new duty. As regards the goods and chattels, the defendants are only liable to the stamp duty imposed by the Stamp Act, 1891, in respect of agreements for sale. The words of a taxing Act must be clear and unambiguous in order to fix the subject with liability, and the word "property" as

(1) [1897] A. C. 1.

used in s. 12 of the Act of 1895 does not clearly include goods, wares, and merchandise.

The 2000*l.* was not part of the consideration for the sale of the electric company's property; it was a sum paid to them by the defendants as consideration for the option to employ the manager and secretary.

Sir E. Carson, S.-G., was not called on to reply.

KENNEDY J. I am of opinion that the contention for the Crown is right. In 1899 the Eastbourne Electric Light Company, Limited, entered into an agreement with the mayor and corporation of Eastbourne, which recited that the company had acquired land, and erected electric lighting works, and had set up and provided plant, machinery, mains, and other appliances, and had for several years past been supplying electrical energy for public and private purposes within the area specified in their order. The agreement then provided that the corporation should buy, subject to certain provisions, the whole of the undertaking, and all the powers, rights, and privileges conferred on the company, together with the benefit of all contracts, and a freehold piece of land, and all their works, plant, and machinery, and other goods and chattels. The agreement was sanctioned by a provisional order of the Board of Trade, and the provisional order was subsequently confirmed by an Act of Parliament. In order to carry out the agreement a conveyance was executed, and the question before us is, upon what amount the stamp duty imposed by s. 12 of the Finance Act, 1895, ought to be calculated. [The learned judge read s. 12.] That section, to my mind, clearly means that, whenever a conveyance is produced on a sale authorized by Act of Parliament, the conveyance must be stamped with the ad valorem duty payable on the conveyance on sale of all the property authorized to be sold. That which was authorized here was a sale of the property for which the sums of 82,000*l.* and 6614*l.* were the consideration, and I fail altogether to see how it can be said that 37,929*l.*, representing the consideration for the goods which are included in the conveyance, can be taken out of the whole consideration, it being conceded that, if an instrument

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of conveyance of goods alone be executed, that instrument must, under s. 54 of the Stamp Act, 1891, be stamped with ad valorem duty. It was contended that s. 12 of the Finance Act, 1895, only meant to include property which required a conveyance in order to vest it in the purchaser, and that, as goods, wares and merchandise do not require a conveyance in order to transfer them to a buyer, they need not have been put into this conveyance, and ought not to be treated as being the subject of the conveyance for the purposes of stamp duty. That argument is not, I think, well founded. I think it is plain that where Parliament requires for the validity of the transaction a conveyance of property, and that property is in fact conveyed by an instrument of conveyance, the ad valorem duty must be paid in respect of all that is conveyed.

A further point was raised with respect to the 2000*l.* That was a sum by which the contract price might have been reduced if the corporation of Eastbourne were willing to take over and continue in their service the manager and secretary of the electric lighting company. They did not take them over; the contract price was not reduced, and I see no reason whatever for not including that sum of 2000*l.* in the amount on which stamp duty must be paid.

PHILLIMORE J. I am of the same opinion. Sect. 12 of the Finance Act, 1895, requires that where any person is authorized to purchase any property by virtue of any Act of Parliament, he shall within three months produce a conveyance, duly stamped, of the property which he is authorized to purchase. Here the mayor and corporation of Eastbourne were authorized by Act of Parliament to purchase the property, including realty and personalty, of this electrical company. Being so authorized, they were required within three months to produce a conveyance, not of part of that property, but of all that property; and inasmuch as they have to produce a conveyance of all that property, they must pay the stamp duty upon all of it. Personal property—ordinary personal chattels—may as a rule pass by delivery, and there is no instrument required, and therefore no stamp; but if the passing of personal property

requires an instrument, that instrument has, for the purposes of the Finance Act, 1895, to be stamped in the same way and in the same proportion as an instrument conveying realty. As to the other point, I have nothing to add to what my brother Kennedy has said.

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Judgment for the Crown.

Solicitor for the Crown: *The Solicitor of Inland Revenue.*

Solicitors for defendants: *Sharpe, Parkers & Co., for the Town Clerk of Eastbourne.*

W. A.

GRAHAM AND OTHERS *v.* HIS MAJESTY'S COMMISSIONERS OF PUBLIC WORKS AND BUILDINGS.

1901. *May* 21, 22.

Crown—Prerogative—Servants of the Crown—Contracts—Liability to be Sued —The Commissioners of Public Works and Buildings.

An action will lie against His Majesty's Commissioners of Public Works and Buildings, who are incorporated by statute, for damages for breach of a contract entered into by them with a firm of builders for the erection of a public building:—

So *held*, by Ridley J., because the Commissioners must be taken to have made the contract specially themselves, and not as agents of the Crown;

By Phillimore J., because the Commissioners are in the position of servants of the Crown who may be sued on their contracts for the purpose of obtaining a judgment declaratory of the right of the subject who has contracted with them.

ARGUMENT of a point of law raised on the pleadings in an action.

The statement of claim alleged that the plaintiffs were a firm of builders and contractors carrying on their business at Huddersfield, and the defendants were a corporation incorporated under 15 & 16 Vict. c. 28, and 37 & 38 Vict. c. 84; that by an indenture dated September 11, 1899, and made between the plaintiffs, of the one part, and the defendants, of the other part, the plaintiffs contracted with the defendants to erect for them a post office, and to complete the same in the mode and according to the specifications and conditions thereunto annexed, and in consideration thereof the defendants agreed with the

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plaintiffs to pay them the price or sum of 5473*l.* by the instalments at the times and in the manner declared in the same indenture and conditions; that in pursuance and execution of that contract the plaintiffs commenced to erect the post office and partly erected it, and were always ready and willing to complete it, but the defendants, on January 2, 1901, served upon the plaintiffs a written notice wrongfully determining and repudiating the contract and preventing the plaintiffs from executing and performing the same; that subsequently the defendants wrongfully entered upon the land upon which the post office was being erected, and seized plant and building materials thereon belonging to the plaintiffs, and wrongfully deprived the plaintiffs of the same by refusing to give them up on demand.

The plaintiffs claimed damages for these alleged wrongful acts of the defendants.

The first paragraph of the defence was as follows:—

The defendants object that no claim in this action can in any event be maintained against them upon the contract alleged, and that the plaintiffs can put forward such claim only (if at all) by petition of right. The defendants are a corporation under and subject to the provisions of and with the powers conferred by 14 & 15 Vict. c. 42, 15 & 16 Vict. c. 28, and 37 & 38 Vict. c. 84, and not further or otherwise. The contract mentioned in the statement of claim was entered into by the defendants as servants and agents of the Crown and on behalf of the Crown as a department of the Government, and not otherwise.

By their reply the plaintiffs denied that the contract mentioned in the statement of claim was entered into by the defendants as servants and agents of the Crown and on behalf of the Crown as a department of the Government, and not otherwise, and alleged that the same was entered into by the defendants as principals, and that the defendants were a corporation to all intents and purposes. The plaintiffs also joined issue on the point of law raised by the first paragraph of the defence, and submitted that the same should be heard and determined by the Court before the trial of the action.

The point of law accordingly now came to be heard and determined before the Divisional Court.

Sir Robert Finlay, *A.-G.*, and *G. R. Askwith*, for the defendants. The first paragraph of the defence is good by way of demurrer. An action does not lie against the Commissioners. The general principle applies to them that a servant of the Crown, who contracts on behalf of the Crown, cannot be sued on his contract: *Gidley* v. *Lord Palmerston* (1); *Palmer* v. *Hutchinson* (2); *Dunn* v. *Macdonald*. (3) If the facts bring the Commissioners within that principle, the circumstance that they are incorporated by statute cannot affect the question. They have no property apart from Crown property to satisfy a judgment against them. It is necessary to call attention to the statutes under which they are constituted. Formerly the two departments—the Works and Buildings and the Woods and Forests—were separated. By 22 Geo. 3, c. 82, s. 1, certain offices, including the office of the Board of Works, were suppressed. By ss. 6 to 12 His Majesty's buildings and the Royal gardens were put under the direction of a surveyor or comptroller to be appointed by the King, and new buildings and repairs were directed to be executed with the approval of the Commissioners of the Treasury in the manner specified in those sections. That Act was superseded, so far as related to works and buildings, by 54 Geo. 3, c. 157. By s. 2 the King might appoint a Surveyor-General of His Majesty's Works and Public Buildings, and by s. 9 regulations, some of which are still in force, were to be prepared by the Commissioners of the Treasury for the conduct of the whole business of the Office of Works and the control of its expenditure. By 10 Geo. 4, c. 50, s. 8, the Office of Woods and Forests was constituted, and under s. 17, which does not apply here, the Commissioners of Woods and Forests might be sued in respect of contracts made by them as Commissioners, but were exempt from any personal liability. By 2 Will. 4, c. 1, s. 1, the offices of the Surveyor-General of Works and Public Buildings and the Commissioners

(1) (1822) 3 B. & B. 275; 24 R. R. 668. (2) (1881) 6 App. Cas. 619.
(3) [1897] 1 Q. B. 401; [1897] 1 Q. B. 555.

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of Woods and Forests were united, and three Commissioners were directed to be appointed, to be called "The Commissioners of His Majesty's Woods, Forests, Land Revenues, Works, and Buildings." Sect. 2 applied the regulations made under 54 Geo. 3, c. 157. Sect. 8 vested in the Commissioners the powers given by former Acts. The statute 14 & 15 Vict. c. 42, enacted further provisions with respect to the Commissioners, their duties and salaries, and the departments of the Works and of the Woods and Forests were practically separated. By s. 31, pending contracts with respect to works and buildings entered into by the Commissioners of Woods, Forests, Land Revenues, Works, and Buildings were transferred to the Commissioners of Works and Buildings, and to be enforced as if the Commissioners of Works and Buildings had been named therein; but the prerogative or rights of Her Majesty, and the right, power, or duty of the Attorney-General to sue or defend, were expressly saved. One of those prerogatives or rights is that the Crown cannot be proceeded against except by petition of right. By 15 & 16 Vict. c. 28, s. 1, the Commissioners of Works and Buildings were incorporated for the purposes of holding lands, and the Act further gave them powers of selling, purchasing, and making contracts in respect of lands. The statute 15 & 16 Vict. c. 29, gave them power to lay out Kennington Common, and they were constituted a corporation for that purpose with an express power to sue and be sued, but only in respect of contracts made in exercise of their powers under that Act. In 21 & 22 Vict. c. 40, which gave them power to acquire property in Edinburgh for the erection of a General Post Office, and other powers, there is also (s. 22) an express saving of the prerogative and rights of the Crown. The Works and Public Buildings Act, 1874 (37 & 38 Vict. c. 84), recites that there are divers corporations, created by prior Acts of Parliament, and now subsisting under the same name of "The Commissioners of Her Majesty's Works and Public Buildings," and incorporates them generally, the previous incorporations for special objects being dissolved. There is no general power in any statute enabling the corporation to sue and be sued. The whole course of the legislation shews that

where it was intended they should sue and be sued, special provisions were deemed necessary. There is no provision for satisfying a judgment against them, and that consideration tells against the view that any such general power was intended. No doubt they can grant leases and enter into covenants and contracts, but that power is subject to the prerogative and rights of the Crown. The prerogative of the Crown cannot be taken away except by express words: *Théberge* v. *Laudry* (1); *Cushing* v. *Dupuy*. (2)

[They also referred to *Reg.* v. *McCann* (3); *In re Nathan* (4); *In re Wood's Estate, Ex parte Her Majesty's Commissioners of Works and Buildings*. (5)]

Scott Fox, K.C. (*J. Andrew Strahan* with him), for the plaintiffs. The action will lie. It is an action against the Commissioners on a contract made by them with builders; it is not an action against a Government department. The question depends upon whether the contract is made on behalf of the Crown, or by the servant of the Crown himself. In *Churchward* v. *Reg.* (6) a petition of right had to be resorted to because the contract was made by the Commissioners of Admiralty on behalf of the Crown. Servants of the Crown have only been held not liable to action by reason of the general rule of law that a person who makes a contract on behalf of another is not liable on that contract. The course of the legislation which has been referred to supports the view that the Commissioners were intended to sue and be sued on their contracts. Probably before their incorporation the Commissioners of Works only acted as agents for the Crown. Sect. 31 of 14 & 15 Vict. c. 42, transfers pending contracts in respect of works to the Commissioners of Works. Those contracts are split up into three classes, and "the benefit and obligation of such contracts" shall be deemed to be vested in Her Majesty, or the Commissioners of Woods, Forests, and Land Revenues, or the Commissioners of Works and Buildings, according to the direction of the Commissioners of the Treasury. The Act

(1) (1876) 2 App. Cas. 102.
(2) (1880) 5 App. Cas. 409.
(3) (1868) L. R. 3 Q. B. 677.
(4) (1884) 12 Q. B. D. 461.
(5) (1886) 31 Ch. D. 607.
(6) (1865) L. R. 1 Q. B. 173.

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recognises that the liabilities of the former body should be thrown separately upon the new ones. By 15 & 16 Vict. c. 28, the Commissioners of Works were incorporated for the purpose of holding, buying, and conveying lands, with powers of entering into covenants and agreements in respect of them. The very object of incorporating a body is to enable it to sue and be sued. Having been incorporated for various specific purposes before 1874, they were by the statute of that year incorporated for all intents and purposes. The course of legislation has been to simplify the assertion of rights by selecting private persons and incorporating them in order that a declaration of right might in the first instance be obtained. In *Nurse* v. *Lord Seymour* (1) it was held that specific performance of a contract in respect of land could not be enforced against the Commissioners of Woods and Forests because they could not hold lands, and the land in question was not vested in them. The Act of the following year was passed in order to get rid of the difficulty. In *Corbett* v. *Commissioners of Her Majesty's Works and Public Buildings* (2) specific performance of an agreement to purchase an interest in land was decreed against the defendants; and in *Thorn* v. *Commissioners of Public Works* (3) specific performance of a contract to buy stone was also enforced against them.

G. R. Askwith, in reply. The cases in which actions have been maintained against the Commissioners do not affect the question of their general liability to be sued. No doubt they have been sued in respect of things done by them in the exercise of special powers given by special Acts of Parliament. In any case the Crown could not be deprived of its prerogative right by any laches on the part of its servants in not taking the point that no action would lie against them as servants of the Crown.

RIDLEY J. I am of opinion that our judgment should be for the plaintiffs. If the question had turned upon the construction of the statutes, referred to by the Attorney-General,

(1) (1851) 13 Beav. 254. (2) (1868) 18 L. T. 548.
(3) (1863) 32 Beav. 490.

which deal with the constitution and powers of the defendants and of the Commissioners of Woods and Forests, I should have required time to consider those statutes more carefully; but I think that the point before us may be decided without special reference to them. The general principle, upon which the question in this case turns, is that an officer appointed by the Crown, and treated as the agent of the Crown to deal with the public, is not liable to be sued upon a contract made by him in that capacity. The question here is, Have the defendants, or have they not, been acting in this particular case in their capacity of agents for the Crown? There are several decisions which may guide us in determining that question, and I propose to make my judgment turn upon those decisions rather than upon the particular instances in which the defendants have been held liable under particular Acts of Parliament. Those Acts are contained in the 1st schedule of the Works and Public Buildings Act, 1874, and they no doubt contain provisions which might seem to make the Commissioners' liability to be sued depend upon special enactment rather than upon any general principle. But I think that what we have to decide here is whether the particular contract was made by the Commissioners for and on behalf of the Crown, or was a contract made by the Commissioners themselves. In *Gidley* v. *Lord Palmerston* (1) the defendant, who was Secretary of State for War, was sued upon his obligation to pay a retiring allowance alleged to be due to the plaintiff. Lord Palmerston had made no contract with the plaintiff; he could not be liable except by reason of his position as a servant of the Crown, and it was only by reason of that position that the liability was alleged to rest upon him. It was held accordingly that no action would lie against him. In *Dunn* v. *Macdonald* (2) the defendant had been appointed Her Majesty's Commissioner and Consul-General for a Protectorate in Africa, and he had engaged the plaintiff to serve with him as a public servant in the Protectorate for three years certain. Primâ facie one would suppose that unless the defendant, Sir Claude

(1) 3 B. & B. 275; 24 R. R. 668.
(2) [1897] 1 Q. B. 401; [1897] 1 Q. B. 555.

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Macdonald, had been acting as a servant of the Crown in his capacity of Commissioner and Consul-General, he never would have so engaged the plaintiff. The case was that of a person appointed for a particular purpose engaging another for that purpose. The Court held that the defendant was not liable, because he had made no express contract himself with the plaintiff, and there was no express or implied warranty of the defendant's authority to contract that the plaintiff should be employed for three years. I think the decision must be regarded rather as an application of the general principle to the particular case than as laying down that general principle. Lopes L.J. (1) said, with respect to the application of the general principle, which, indeed, seems to be undisputed: "The liabilities of public agents on contracts made by them in their public capacity are on a different footing from the liabilities of ordinary agents on their contracts. In the former case, unless there is something special which would be evidence of an intention to be personally liable, an agent acting on behalf of a Government is not liable for breach of a contract made in his public capacity, even though he would by the terms of the contract be bound if it were an agency of a private nature." I take that to mean that, although the agent were to put his own name in the contract without stating that he was agent for the Crown, yet, if you could gather from the surrounding circumstances of the case that he did in fact contract as agent for the Crown, and in that capacity only, he would not be liable upon the contract. It might be, therefore, that from the surrounding circumstances of the case now before us we ought to conclude that the defendants were contracting as servants of the Crown only; but all the facts point, I think, in the opposite direction. It is a case far removed from either of the two authorities I have mentioned. The Commissioners of Works make these contracts, in the course of their duty, in all parts of the country in respect of works required for His Majesty's Government. I think the true inference is that they make them in their own capacity. There is nothing like the special appointment in *Dunn* v. *Macdonald* (2); nor is

(1) [1897] 1 Q. B. at p. 557. (2) [1897] 1 Q. B. 401; [1897] 1 Q. B. 555.

there any such relation between the Commissioners and the contractor as existed between the defendant and the plaintiff in *Gidley* v. *Lord Palmerston*. (1) I think this is a case in which the defendants have expressly contracted for themselves. If judgment be given against them when the action is tried, the judgment will, I suppose, be satisfied out of the funds granted by Parliament. Lindley L.J.'s judgment in *In re Wood's Estate, Ex parte Her Majesty's Commissioners of Works and Buildings* (2), shews the way he regarded the position of the Commissioners in that case. He said (3): "No authority has been cited to shew that this particular corporation, incorporated by the Act of 1855 for certain public purposes, is to be treated as the Crown, and there is no ground for holding that a corporation specially incorporated in this way is in the same position as regards costs as the Crown." It is true that the precise point here did not arise in that case, for the decision turned on the 18 & 19 Vict. c. 95, and the Lands Clauses Act, which it incorporated. It was held that the Commissioners were bound by the provisions as to costs in the incorporated Act. But the objection was taken that the Crown would not be bound to pay costs, and it was dealt with by saying that there was no ground for saying that such a corporation, specially incorporated in this way, is in the same position as the Crown.

For these reasons I am of opinion that this case must be treated as one in which the defendants have themselves specially made this contract, and that they are liable to be sued upon it.

PHILLIMORE J. I am of the same opinion; but I prefer to put my judgment upon a somewhat different ground. I think the Attorney-General rightly treated this case as depending upon whether or not the principle applied that a servant of the Crown as such cannot be sued. The Crown cannot be sued; and, that being so, neither can the subject take action indirectly against the Crown by suing a servant of the Crown upon a

(1) 3 B. & B. 275; 24 R. R. 668. (2) 31 Ch. D. 607.
(3) 31 Ch. D. at p. 621.

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contract made by the servant as agent for the Crown. A Crown servant making a contract for the Crown is no more liable than any other agent making a contract for his principal. But for facilitating the conduct of business it is extremely convenient that the Crown should establish officials or corporations who can speedily sue and be sued in respect of business engagements without the formalities of the procedure necessary when a subject is seeking redress from his Sovereign. It is desirable for the proper conduct of business that persons who contract with the Crown for business purposes should have the same power of appealing to His Majesty's Courts of Justice against a misconstruction of the contract by the head of a department as any subject might have against his fellow subject. For that purpose the Crown has, with the consent of Parliament, in certain cases established certain officials who are to be treated as agents of the Crown but with a power of contracting as principals. The Secretary of State for War and the Postmaster-General are known instances of this. Apparently the Commissioners of Woods and Forests are also an instance: they are a corporation incorporated for that purpose. There seems, too, to be no doubt that for certain purposes the Commissioners of Works and Public Buildings are liable to be sued. So, under the Merchant Shipping Act the Legislature has appointed a public official who may be sued for torts—not for his own tort, but for the tort possibly of the President of the Board of Trade, or of some official at a seaport, in detaining a ship as unseaworthy which in fact was not. In such cases the remedy is really sought against the Crown, and the judgment is declaratory only. No execution can follow upon it, because there are no moneys out of which damages can be paid except moneys provided by Parliament for the purpose. The procedure amounts to obtaining a decision in the nature of a decision upon a hypothesis—namely, if the person sued were a subject, what would be the decision of the Court on the case brought against him? The principle which is found in the Merchant Shipping Act is a useful one to consider; it shews that the Crown is the real entity pursued, although through the medium of a subject, and the privileges

which the Crown has as to the mode of trial apply to such cases. In *Dixon* v. *Farrer* (1) the Secretary of the Board of Trade was sued for the act of his subordinate in detaining a ship supposed to be unseaworthy. The Attorney-General of the day claimed, and successfully maintained his claim, to treat the action as a suit against the Crown, and to exercise the prerogative right of the Crown to lay the venue in whatever county it pleased. Now, the only question for us is whether the Commissioners of Public Works and Buildings are not of the class of persons well described by Lindley L.J. in *Dixon* v. *Farrer* (1) as "a nominal defendant sued as representing one of the departments of the State." There is no reason in principle why they should not be. As I have pointed out, there is nothing derogatory to the Crown, and there is very great convenience, in the establishment of such bodies. The mere fact of their being incorporated without reservation confers, it seems to me, the privilege of suing and the liability to be sued. Having regard to the facts that they are made a corporation, that there is no restriction with respect to them which would prevent their being subject to the ordinary incidents of a corporation, and that in fact they have been sued in cases where their powers have been specially derived from certain Acts of Parliament, I see no reason for holding that their liability to be sued is restricted to cases coming under those Acts. I think that they have a general liability to be sued for the purpose of obtaining a decision, although, of course, no execution can go against them because their property (if they have any, and probably they have not) is Crown property, as was the case in *Reg.* v. *McCann* (2), and the judgment against them would have to be satisfied, if at all, out of moneys provided by Parliament for that purpose.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Van Sandau & Co., for Mills & Co., Huddersfield.*

Solicitor for defendants: *The Solicitor to the Treasury.*

(1) (1886) 17 Q. B. D. 658; 18 Q. B. D. 43.
(2) L. R. 3 Q. B. 677.

W. A.

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May 21.

In re An Arbitration between MARGETTS and THE OCEAN ACCIDENT AND GUARANTEE CORPORATION, LIMITED.

Insurance (Marine)—Construction of Policy—Collision between Vessels, What is—Vessel Riding at Anchor—Collision with Anchor.

A policy of marine insurance provided that the insurers would pay to the assured the amount of any damage caused to any of his tugs "owing to actual collision between any such tug and any vessel, bridge, wharf, mooring pier, or similar structure." One of the assured's tugs, whilst coming up the river Thames, was damaged by striking upon a vessel's anchor, to which the vessel was riding attached by a chain:—

Held, that the tug had come into collision with a "vessel" within the meaning of the policy, and, therefore, that the insurers were liable.

Case stated by an arbitrator.

By a policy of assurance, dated December 1, 1899, made between P. Margetts, the assured, and the Ocean Accident and Guarantee Corporation, Limited, it was provided that any difference should be referred to arbitration.

By the policy it was provided that the corporation would pay to the assured, inter alia, the amount of any damage which should be caused to any tugs belonging to the assured, and covered by the policy, "owing to actual collision between any such tug and any vessel, bridge, wharf, mooring pier, or similar structure."

The *Ada* was a tug belonging to the assured and covered by the policy.

On August 13, 1900, the *Ada*, while coming up the river Thames on the north side of the mid-channel, ported her helm to avoid a down-coming steamer, and struck upon an anchor in the bed of the river. The anchor was attached by about twenty or thirty fathoms of chain to a schooner called *The Excel*, which was lying on the north bank of the river with her afterpart on the mud, but attached to the anchor at her bows. In consequence of striking the anchor the tug sank and sustained considerable damage. It was agreed that 490*l.* was due

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from the corporation to the assured if the corporation were liable under the above circumstances.

It was contended on behalf of the corporation that the anchor was not part of the schooner, and that the striking of it by the tug was not an actual collision between the tug and the vessel.

So far as it might be a question of fact for him, the arbitrator found that, under the circumstances, the anchor was part of the schooner, and that the striking of the same by the tug was a collision between the tug and the vessel.

The question for the opinion of the Court was whether, upon the facts stated, the corporation were liable to pay to the assured the amount of the damage to the tug.

A. E. Nelson, for Margetts. The anchor was part of the vessel, the *Excel*, so that the tug came into actual collision with a "vessel" within the meaning of the policy. An anchor is as much part of a vessel as her hull or bowsprit; she is not seaworthy without it. It makes no difference whether the anchor is hanging at her bows, or is in the ground at a distance from the ship; so long as it is the anchor belonging and attached to the ship, a collision with it is a collision with the ship. Although there is no direct authority on the question, the judgments of the House of Lords in *M'Cowan* v. *Baine*, *The Niobe* (1), throw light upon what appurtenances of the ship are to be regarded as parts of the ship within the meaning of similar clauses in marine policies: see also *The Warwick*. (2)

Spencer Bower, for the insurance company. The question here is whether the anchor, under the circumstances, was part of the vessel as a thing with which there could be a collision within the meaning of the policy. It was not, in that sense, a "vessel" within the terms of the policy. In *The Niobe* (1) a tug towing a vessel was held to be part of the thing which did the damage, the tug being the motive power of the vessel, and therefore one and the same thing as the vessel. The clause in this policy is different: it includes collisions with permanent

(1) [1891] A. C. 401. (2) (1890) 15 P. D. 189.

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immobile structures. The judgments of the House of Lords in *The Niobe* (1), therefore, do not apply.

[PHILLIMORE J. referred to *Gale* v. *Laurie.* (2)]

That is not an analogous case. The question there discussed was whether certain things were "appurtenances" of a ship within the meaning of a statute. Here it may be conceded that the anchor is an appurtenance of the ship; but there is no insurance of appurtenances in this policy. In *Hoskins* v. *Pickersgill* (3) the fishing gear of a smack was held not to be part of the vessel.

[PHILLIMORE J. That decision turned on the question of usage.]

Where a ship is riding at anchor, or moving up to its anchor, the ship and the anchor constitute two termini: see *The Romance* (4); and the words "actual collision with any vessel, bridge, wharf, &c., or similar structure" do not cover a collision with the anchor. They indicate that a collision with something which is in itself a complete structure was intended.

RIDLEY J. I am of opinion that the question we have to decide must be answered by saying that the insurance company are liable to pay the damages, which have been agreed upon in case they should be held liable. The question arises from the fact that the assured's tug, the *Ada*, came into collision with an anchor to which a schooner was riding by about twenty fathoms of chain, the afterpart of the schooner being upon the mud. The question is whether the anchor was part of a vessel. I think that it was, and therefore that the clause in the policy applies which provides for the payment by the insurance company of the amount of any damage caused to the assured's tugs owing to actual collision with any vessel. I can conceive that at first sight and in popular language an anchor would be described as distinct from a vessel. One would say that the tug came into collision with the anchor, not with the ship. But when one comes to look at the authorities, and to consider

(1) [1891] A. C. 401.
(2) (1826) 5 B. & C. 156; 4 L. J. (O.S.) (K.B.) 149; 29 R. R. 199.
(3) (1783) 3 Doug. 222.
(4) [1901] P. 15.

what is the proper legal definition of a "vessel," it is plain, to my mind, that the anchor must be regarded as part of the vessel. There is no absolute decision on the point. It was contended by counsel for the insurance company that, under the circumstances of this case the anchor must be regarded as a different thing from the vessel. It is true that the anchor when it is being used may be, as it was here, a considerable distance from the vessel; but it is, I think, not the less a portion of the vessel. In *The Niobe* (1) the question arose, not with respect to an anchor, but with respect to a tug, which was towing the *Niobe* and came into collision with another vessel. The House of Lords held that the ship towed was liable for damages, and that the tug and the ship towed must be regarded as one and the same vessel. It was necessary in that case to consider the general way in which similar words in a marine policy ought to be construed. Lord Selborne came to the conclusion that the narrow meaning of the words "come into collision with any other ship" ought not be adhered to. He said, "If a ship cannot be said to 'come into collision with any other ship' except by direct contact, causing damage, between the two hulls (including under the term 'hull' all parts of a ship's structure) there was in this case no such contact, and the appellants ought to succeed. But I cannot adopt so narrow a construction of those words. I should hold them to extend to cases in which the injury was caused by the impact, not only of the hull of the ship insured, but of her boats or steam-launch, even if those accessories were not (as in this case) insured as being in effect parts of the ship." That is a stronger decision than we are arriving at here. The ratio of it is that a ship may come into collision with another otherwise than by direct contact of their hulls, and, having got so far as that, that a tug, the ship's boats, and accessories can be regarded as the ship itself for the purpose of determining whether there has been a collision within the policy. In the present case we need not rely on some of the reasons which the House of Lords gave with respect to the case of a tug. I

(1) [1891] A. C. 401.

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observe that Lord Morris said that he considered the tug part of the apparatus for moving the ship. It is enough for us to say that the anchor must be regarded in the same way as the tug was regarded in *The Niobe* (1), and in the same way as the judgments shew that the boats and other accessories would have been regarded had they been in question in that case. It was contended by counsel for the insurance company that the damage was caused by a collision with the anchor which was a stationary thing, and not, as in *The Niobe* (1), by a collision caused by a thing which was moving, and he sought to distinguish the case of *The Niobe* (1) upon the ground that the terms of the policy were different. But I think we must call the anchor part of the vessel, and say that the collision was with a vessel within the meaning of the policy. The other cases cited, though some of them point in the same direction as our decision here, are further away from the question. In *The Warwick* (2), which was an action for damages caused by sailing across the bows of a fishing smack and cutting her trawl warp, the county court judge held that there had been a collision with the smack, though it is true that the question whether the warp was part of the vessel was not discussed on appeal. We must answer the question stated for our opinion in the affirmative.

PHILLIMORE J. I am of the same opinion. We have to consider whether the tug came into collision with another vessel, the *Excel*, within the terms of the policy. I think it may fairly be said that a vessel comes into collision with another vessel if it comes into contact with any portion of that other vessel. There are many movable things about a ship which may be treated as appurtenances of the ship. In a narrow view it may be said that the hull, masts, yards, standing rigging, bridge (in the case of a steamer) form the ship, and that these alone are parts of the ship; but if there be a collision with projecting booms, or boats at the side, or with the anchor at the bows, no one could doubt that in the fair use of language

(1) [1891] A. C. 401. (2) 15 P. D. 189.

it is a collision with the ship. A ship often extends her area by swinging boats over her side, or casting out her anchor, and, in my opinion, a collision with the anchor belonging and attached to the ship, although it be at a distance from her, is a collision with an extended portion of the ship. The decision in *The Niobe* (1) was much stronger than our decision here. The House of Lords held that damage done by the tug to the *Valetta* was damage done by the tow. If the damage to the *Valetta* had been caused by the tow-rope fouling her, no one can doubt that she would have been entitled to recover as having come into collision with the tow. In arriving at our decision we gain some assistance from *Gale* v. *Laurie* (2) and *The Warwick*. (3) I am of opinion that, both upon principle and having regard to the reasoning of the decision of the House of Lords in *The Niobe* (1), the question asked us in the case should be answered in the affirmative.

Judgment accordingly.

Solicitors for Margetts: *Lowless & Co.*
Solicitors for insurance company: *William Hurd & Son.*

(1) [1891] A. C. 401. (K.B.) 149; 29 R. R. 199.
(2) 5 B. & C. 156; 4 L. J. (O.S.) (3) 15 P. D. 189.

W. A.

1901
May 22.

In re AN ARBITRATION BETWEEN THE BWLLFA AND MERTHYR DARE STEAM COLLIERIES (1891), LIMITED, AND THE PONTYPRIDD WATERWORKS COMPANY.

Lands Clauses Acts—Compensation—Arbitration—Preventing the Working of Coal Mines—Notice to Treat—Rise in Value of Coal after Notice to Treat, whether Arbitrator can consider in assessing Compensation.

In an arbitration under the Lands Clauses Acts and the Waterworks Clauses Act, 1847, to assess the compensation payable to the owner of coal mines in respect of his being prevented from working seams of coal lying under and near to the reservoir of a waterworks company, the arbitrator is entitled to take into consideration, as an element in determining the amount of compensation to be paid, a rise in the value of coal which has occurred between the date of the company's notice to treat and the making of his award.

CASE stated by an arbitrator in his award made in a reference for the purpose of assessing compensation under the Lands Clauses Acts.

The following material facts were stated in the award:—

The Bwllfa and Merthyr Dare Steam Collieries (1891), Limited (hereinafter called the coal company), were the lessees of certain mines and seams of coal, in the county of Glamorgan, lying under a portion of a reservoir authorized to be made, under the Pontypridd Waterworks Act, 1892, by the Pontypridd Waterworks Company (hereinafter called the waterworks company), and under lands within the distance of forty yards from the reservoir on one side thereof.

By a notice in writing, dated September 2, 1898, under the hand of the secretary of the coal company, the latter, being desirous of working one of the seams of coal lying under the reservoir and under the lands within the distance of forty yards from the same, gave notice to the waterworks company that they would, after the expiration of thirty days from the service of the notice, begin to work that seam, unless in the meantime the waterworks company should signify their willingness to make compensation therefor.

By a notice in writing, dated October 15, 1898, under the hand of their secretary, the waterworks company, under the provisions of the Pontypridd Waterworks Act, 1892, and of the Lands Clauses Acts and other Acts respectively incorporated therewith (1), gave notice to the coal company that they were willing to make compensation to the latter for their estate and interest in so much of the seam of coal as the waterworks company required the coal company to leave unworked, and demanded particulars of their estate and interest and of their claims in respect thereof, and, further, gave them notice that if for twenty-one days after the service of that notice they failed to state the particulars of their claim, or to treat with the waterworks company in respect of the coal, the amount of compensation payable to them would, by virtue of s. 21 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), be settled in the manner provided by that Act.

By a notice in writing, dated March 2, 1899, under the hand of their secretary, the coal company sent the required particulars to the waterworks company, and gave them notice that, unless they were willing to agree to pay to the coal company the sum of 6084*l.*, the coal company desired to have the amount of compensation settled by arbitration under the Lands Clauses Consolidation Act, 1845.

The waterworks company refused to pay the coal company the sum of 6084*l.*

Two arbitrators and an umpire were appointed for the coal company and the waterworks company respectively, and, after several extensions of the time for making the award, the time was extended until April 30, 1901. The arbitration commenced shortly before that date, and whilst it was proceeding it was agreed between the parties, with the consent of the two arbitrators, that the arbitrators should retire, and that the

(1) The Pontypridd Waterworks Act, 1892 (55 & 56 Vict. c. cviii.), incorporated the Lands Clauses Acts and the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17). The notices set forth in the award were given under ss. 22, 23 of the latter Act. Sect. 25 provides that if any dispute arise as to compensation the same shall be settled by arbitration in manner provided by the Lands Clauses Consolidation Act.

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umpire should sit alone during the remainder of the reference, and give his award alone; and he accordingly thenceforth took upon himself the sole burden of the reference.

Coal rose in value subsequently to the date of the notice of October 15, 1898.

The 10th paragraph of the award was as follows: "During the said reference the coal company claimed that in consequence of such rise the compensation to be paid by the waterworks company should be assessed, not on the basis of the knowledge of the value of the said part of the said mines, veins, beds, and seams which was possessed at the date of the said notice of October 15, 1898 (which basis is hereinafter called 'the first alternative'), but on the basis of the knowledge of such value which was subsequently acquired (which last-mentioned basis is hereinafter called 'the second alternative')."

It was by consent arranged, during the progress of the reference, that the umpire should state, in the form of a special case for the opinion of the Court, the question whether the coal company were entitled to have the compensation assessed according to the first, or according to the second, alternative, and that he should determine what sums the coal company were entitled to receive from the waterworks company by way of compensation according to the first, or according to the second, alternative respectively.

The umpire made his award, dated April 26, 1901, in the form of a special case accordingly.

The question for the opinion of the Court was, whether the coal company were entitled to have the compensation assessed according to the first, or according to the second, alternative.

If according to the first, the umpire determined that the coal company were entitled to receive as compensation 2950*l.*; if according to the second, 5650*l.*

Abel Thomas, K.C., and *W. D. Benson*, for the coal company. The compensation should be based upon the second alternative stated by the umpire. He ought to take into con-

sideration the probable rise in value of the coal. It does not follow that, because a seam of coal is not presently workable at a profit, no compensation is to be given for it if it is likely to prove profitable in the future: *Brown* v. *Commissioner for Railways.* (1) There was no contract between the coal company and the waterworks company until the award: *Haynes* v. *Haynes.* (2) Where land is taken, although the notice to treat creates a relation analogous to the relation of vendor and purchaser, yet till the price is ascertained the land taken remains the property of the person from whom it is proposed to take it: *Tiverton and North Devon Ry. Co.* v. *Loosemore* (3), judgment of Lord Blackburn. Here the waterworks company did not, and do not, become the owners of the land and coal in question, and until the award is made the right of the coal company to get the coal has not been finally determined. The umpire should assess the value of that right as from the date of the award, taking into consideration what has occurred with respect to the rise in value since the date of the notice to treat, and inferring from that what is likely to occur with respect to the rise or fall in value during the remainder of the term necessary, in ordinary working, to get the coal.

B. F. Williams, K.C. (*Trevor Lewis* with him), for the waterworks company. The first alternative should be adopted. The question to be determined is, What was the value of the coal at the date of the notice to treat, namely, October 15, 1898? A contract between the parties came into existence at that date. In *Haynes* v. *Haynes* (2), though Kindersley V.-C. held that there was no contract for one purpose, the cases there cited shew that there is a contract when notice to treat is given. The notice to treat creates the relation of vendor and purchaser, and in cases like the present it has the effect of transferring the property. In *Penny* v. *Penny* (4) Wood V.-C. said (5) that he took the scheme of the Lands Clauses Consolidation Act to be this: "that every man's interest shall be valued, rebus sic stantibus, just as it occurs at the very

(1) (1890) 15 App. Cas. 240.
(2) (1861) 30 L. J. (Ch.) 578.
(3) (1884) 9 App. Cas. 480, at p. 493.
(4) (1867) L. R. 5 Eq. 227.
(5) L. R. 5 Eq. at p. 236.

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moment when the notice to treat was given," and the same statement of principle is found in the text-books. The purchaser's rights cannot be affected by delay in awarding compensation: *Rhys* v. *Dare Valley Ry. Co.* (1) The umpire, therefore, ought not to take into consideration any evidence of the rise in value of coal after the date of the notice to treat.

Abel Thomas, K.C., was not heard in reply.

RIDLEY J. In this case I propose to say no more than is necessary to decide the question which of the two alternatives stated in the award is the right one to take as the basis of compensation. The first alternative is that the value of the right to work the coal must be assessed without reference to what has taken place since October 15, 1898—the date of the notice to treat—and that in determining the value you must deal with the matter as if you possessed no more knowledge than a vendor, or a purchaser, of the right to work this coal would have had on that date. The second alternative is that you must take into account what has been learnt, and what can be proved to have happened, since that date in order to ascertain the proper price to be paid for that right. It was said, and I think properly said, that the value to be ascertained is the value at the date of the notice to treat; but you have to go further than that, it seems to me, if you adopt the first alternative. It requires you, not only to fix the value as the value at the date of the notice to treat, but to shut your eyes to, and know nothing of, facts which bear upon that value, or would have borne upon that value if they had been known, at the date of the notice to treat, to those who were treating for the purchase. I cannot recognise that position. I think the first alternative is wrong for that reason. It seems to be based upon the argument that because the value is to be ascertained as of the date of the notice to treat, therefore at the date when it is actually fixed you are to know nothing which persons would not have known who were purchasing upon the date of the notice to treat. I do not think that is the right view. I think that although the value at the date of

(1) (1874) L. R. 19 Eq. 93.

the notice to treat is the thing to be ascertained, you may and ought to ascertain it with all proper evidence bearing upon the subject before you. Speaking for the moment as if I were in the position of the arbitrator, I think I ought to say that the value to be ascertained is of October 15, 1898; but that since that date many things have happened, governing the price of coal and therefore the value of the right to work the coal in question, which would have influenced any person treating for the purchase if he had known of those things. I think that I ought to take them into account. My object is to get as nearly as possible at the accurate value, not what would be the comparative guess-work value arrived at by persons who could not know what we know now, namely, the rise and fall of the price of coal which has occurred since October 15, 1898. I believe it is in accordance with the practice in arbitrations for the ascertainment of the value of land or premises taken by railway and other companies to consider evidence of what has taken place since the notice to treat so long as it has any bearing on the value of the property. It is for the arbitrator to get at the fair price. I do not mean that he is to assume absolutely that all the coal in the present case would have been worked out at the high prices. He must recognise that there were high prices, and that there would have been a fall thereafter, and it is with that knowledge that he ought to assess the price or value of the coal on October 15, 1898. Upon examining the second alternative, I do not think it means more than I have been endeavouring to express. The second alternative is that the value ought to be assessed "on the basis of the knowledge of such value which was subsequently acquired." The assessment should be on the basis of all the knowledge subsequently acquired—the knowledge both of the rise and fall, and using the sense and judgment required of an arbitrator, who would consider that the high prices would not last for ever. If the second alternative means no more than that, I am of opinion that the arbitrator would correctly arrive at the value of 5650*l.*

I therefore think that we ought to answer the question by saying that the second alternative is the correct one.

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PHILLIMORE J. I am of the same opinion. I agree that the price or value to be ascertained is the value at the date of the notice to treat. That being so, I think that the arbitrator has put the right question before us. The question is this: In ascertaining the value, ought the arbitrator to discard all subsequent evidence and put himself in the position of a man scientifically inferring from the past to the future at the beginning of the term which would be necessary to work out the coal; or is he entitled to take into consideration actual facts which have happened during a portion of the term, both as facts established for the past and as facts from which further inference can be made, as well as from other sources, for the future? It may be that this point does not often become of great importance. Arbitrations as a rule follow rapidly upon notices to treat, and prices do not often vary so rapidly in the meantime as to make it important to consider this question, and it may be that our decision in the present case will be the first reported decision on the subject. I think, however, that the principle is quite easy to ascertain. Different considerations would apply if there were a market value of this kind of property. If there were a market value, there would be no necessity to do anything but ascertain the value in the market; but, ex hypothesi, there cannot be a market value of things to be taken compulsorily because, if there were, they would not be taken compulsorily, but would be got in the market. There is never any market value of a specific piece of real property. There is a market, and you may occasionally get near to ascertaining the value; but there never can be any market value, for the reason that it is not the intrinsic value of a number of acres of land, but the value of the acres of land there situate, which has to be considered, and the acres of land there situate have their own special and particular value. Once establish that there is no market value, then you have to get at the real value of this property as best you can. It may be that it cannot be less than what a purchaser can be found to give; but it certainly may be more. It does not follow that, because there is no demand for a particular farm, the owner must sell it for an old song—that he is only entitled to get the

price of an old song for it. He is entitled to make the best profit he can out of that piece of real property which belongs to him. It seems to me, therefore, that the arbitrator, when he comes to fix the value as of the date of the notice to treat, must take into consideration evidence which shews what has been the profit made out of that property since the notice to treat was given. If that be true—as I think it is true—with respect to all purchases of lands under the Lands Clauses and other Acts, it is a fortiori true in the present case. This is not the case of a purchase of land. That is now thoroughly established by the decision of the Court of Appeal in *Great Northern Railway* v. *Commissioners of Inland Revenue.* (1) The waterworks company here have not bought the coal-field; they have not even bought the coal; they have only bought the right to prohibit the owners of the coal from getting it. The true inquiry is, not what is the value of the coal-field or of the coal, but what would the colliery company, if they had not been prohibited, have made out of the coal during the time it would have taken them to get it. Assuming that it would have taken them five years, the real loss to the colliery company is what they would have made by getting the amount of coal they naturally would have got in the first year, in the second year, and so on. If you make the estimate before the term of five years has begun, it must be purely inference. If you may make the estimate after the term has begun, you no longer want inference with respect to the two and a half years which has elapsed before the award is made, because you know what would have been the profit made by getting the coal during that period. With respect to the remainder of the five years after the award is made, the assessment must be an estimate; but instead of being an estimate made five years off with a great deal of uncertainty, it is an estimate made only two and a half years off with other elements for the purposes of your calculation. I think it is wrong to say that the arbitrator should exclude those elements. On the contrary, he is bound to include all those elements in his calculation. In other words, he is right to proceed, as he has expressed it, "on the

(1) [1899] 2 Q. B. 652; [1901] 1 K. B. 416.

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basis of the knowledge of such value which was subsequently acquired." I am, therefore, of opinion that the second alternative is right.

Judgment accordingly.

Solicitors for colliery company: *Wrentmore & Son, for Frank James & Sons, Cardiff.*

Solicitors for waterworks company: *Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

W. A.

1901

June 6.

PYM, APPELLANT; WILSHER, RESPONDENT.

Vaccination Acts—Proceedings to obtain Vaccination Order—Condition Precedent—Public Vaccinator—Offer to Vaccinate Child—Vaccination Acts, 1867 (30 & 31 *Vict. c.* 84), *s.* 31; 1898 (61 & 62 *Vict. c.* 49), *s.* 1, *sub-s.* 3.

Sect. 31 of the Vaccination Act, 1867, enables summary proceedings to be taken against parents who, after notice, neglect to have their children vaccinated. The Vaccination Act, 1898, incorporates the Act of 1867, and provides, by s. 1, sub-s. 3, that, if a child is not vaccinated within four months after its birth, the public vaccinator of the district, after notice, shall visit the home of the child and offer to vaccinate it in the prescribed manner:—

Held, that the compliance by the vaccination officer with the provisions of s. 1, sub-s. 3, of the Act of 1898 was not a condition precedent to the right to take proceedings under s. 31 of the Act of 1867.

CASE stated, under the Summary Jurisdiction Acts, by three justices of the county of Derby.

In January, 1901, an information was preferred before the justices by the appellant, an officer appointed by the guardians of the Belper Union in the same county to enforce the provisions of the Vaccination Acts, 1867 to 1898, stating that he had reason to believe that Mabel Wilsher, a child under the age of fourteen years, being within the Belper Union, had not been successfully vaccinated; that he had given notice to the respondent, who was the child's father, to procure its being vaccinated, and that this notice had been disregarded, and praying that the respondent might be summoned to appear and

answer the information, or to shew cause why an order should not be made directing the child to be vaccinated in pursuance of the statute in that behalf.

The proceedings were taken under s. 31 of the Vaccination Act, 1867. (1)

At the hearing of the information the notice from the appellant to the respondent referred to in the information was duly proved, and the following facts were also proved or admitted:—

The child was born on August 18, 1897. The respondent had received a copy of the above-mentioned notice, dated October 23, 1900. The public vaccinator of the district had not given the notice that he intended to visit the home of the child prescribed by s. 1, sub-s. 3, of the Vaccination Act, 1898, nor had he visited the home of the child and offered to vaccinate it as required by that sub-section. (2)

(1) Vaccination Act, 1867 (30 & 31 Vict. c. 84), s. 31: "If any registrar, or any officer appointed by the guardians to enforce the provisions of this Act, shall give information in writing to a justice of the peace that he has reason to believe that any child under the age of fourteen years, being within the union or parish for which the informant acts, has not been successfully vaccinated, and that he has given notice to the parent or person having the custody of such child to procure its being vaccinated, and that this notice has been disregarded, the justice may summon such parent or person to appear with the child before him at a certain time and place, and upon the appearance, if the justice shall find, after such examination as he shall deem necessary, that the child has not been vaccinated, nor has already had the small-pox, he may, if he see fit, make an order under his hand and seal directing such child to be vaccinated within a certain time; and if at the expiration of such time the child shall not have been so vaccinated, or shall not be shewn to be then unfit to be vaccinated, or to be insusceptible of vaccination, the person upon whom such order shall have been made shall be proceeded against summarily, and, unless he can shew some reasonable ground for his omission to carry the order into effect, shall be liable to a penalty not exceeding twenty shillings."

(2) Vaccination Act, 1898 (61 & 62 Vict. c. 49), s. 1, sub-s. 1: "The period within which the parent or other person having the custody of a child shall cause the child to be vaccinated shall be six months from the birth of the child, instead of the period of three months mentioned in s. 16 of the Vaccination Act of 1867, and so much of that section as requires the child to be taken to a public vaccinator to be vaccinated shall be repealed."

Sub-s. 2: "The public vaccinator of the district shall, if the parent or other person having the custody of the child so requires, visit the home

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The justices were of opinion that the Vaccination Acts, 1867 to 1898, were to be read together as one Act so far as the provisions thereof were not expressly repealed; that s. 1, sub-s. 3, of the Vaccination Act, 1898, applied to children born before the passing of that Act; that the provisions of s. 1, sub-s. 3, were imperative and not optional, and were, therefore, a condition precedent to an application for an order under s. 31 of the Vaccination Act, 1867. They accordingly dismissed the information and refused to grant a summons.

The question for the opinion of the Court was whether the justices were right in their decision. If they were, the dismissal was to stand. If they were not, the case was to be remitted to them with the opinion of the Court thereon, or the Court was to make such order as to it might seem meet.

J. H. Etherington Smith, for the appellant. The justices were wrong in coming to the conclusion that the visit of the public vaccinator and the offer by him to vaccinate the child, under s. 1, sub-s. 3, of the Vaccination Act, 1898, were conditions precedent to proceedings under s. 31 of the Act of 1867. Sect. 31 applies both where the child has not been vaccinated at all, and where it has not been successfully vaccinated. The Act of 1898 requires the parent to cause the child to be vaccinated within six months from its birth, instead of three months as provided by s. 16 of the Act of 1867. There is nothing to shew that the Legislature intended the carrying out of the provisions of s. 1, sub-s. 3, to be a condition precedent to proceedings under the earlier Act. Sect. 1, sub-s. 3, was not intended to apply at all to children born before the passing of the Act. In the present case the parent of the child was in default in the year 1897.

No counsel appeared for the respondent.

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of the child for the purpose of vaccinating the child."

Sub-s. 3: "If a child is not vaccinated within four months after its birth, the public vaccinator of the district, after at least twenty-four hours' notice to the parent, shall visit the home of the child, and shall offer to vaccinate the child with glycerinated calf lymph, or such other lymph as may be issued by the Local Government Board."

By s. 10, sub-s. 3, the Vaccination Acts, 1867, 1871, 1874, and this Act shall be construed together as one Act.

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RIDLEY J. It is unfortunate in this case that no counsel has appeared for the respondent. We should have liked to have heard the case argued on the other side. As the matter stands before us, and having considered, so far as we are able, the provisions of the statutes, we think that the justices came to a wrong conclusion, and that they ought to have required the respondent to answer the information and shew cause. Sect. 1, sub-s. 3, of the Vaccination Act, 1898, upon which their decision was founded, contains a direction that, if a child is not vaccinated within four months after its birth, the public vaccinator shall, after notice to the parent, visit the home of the child and offer to vaccinate it with glycerinated calf lymph, or such other lymph as may be issued by the Local Government Board. That is one of the general provisions of the Act contained in s. 1, which is a general enactment with respect to the period within which children should be vaccinated. I think sub-s. 3 would probably apply, though I am not deciding that it would, to a child born before the passing of the Act, so long as it was born at a time which made it still a child to which the Acts apply. I think that is a probable construction of the Act because of s. 2, sub-s. 2, which provides, with respect to the exemption from penalties which a parent may obtain, that "this section shall come into operation on the passing of this Act, but in its application to a child born before the passing of this Act there shall be substituted for the period of four months from the birth of the child the period of four months from the passing of this Act." Sect. 2 assumes, therefore, that the words in the first part of that section include children born before the passing of the Act. It is probable, therefore, that sub-s. 3 of s. 1 was also intended to include those children, and so construed it would be a beneficial enactment. But having got so far as that, I find a difficulty in seeing how sub-s. 3 makes the visit of the public vaccinator a condition precedent to the right to take proceedings under s. 31 of the Act of 1867. Sub-s. 3 of s. 1 of the Act of 1898 is an enactment intended to be beneficial to the children; but the Act nowhere says that before any prosecution can be instituted for neglect to have a child vaccinated it must be shewn that the public vaccinator

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has complied with the provisions of sub-s. 3. It may be said that the Legislature intended that s. 31 of the Act of 1867 should remain as it was, but that, whilst so leaving it as it was, a general provision was put in the Act of 1898 which would prevent parents from being proceeded against under s. 31 if the public vaccinator had not visited the home of the child and offered to vaccinate it. The answer is that the Act does not say so. It does not, to my mind, follow from sub-s. 3 that the visit of the public vaccinator is a condition precedent to the right to prosecute. The justices were of opinion that the provisions of sub-s. 3 "are imperative and not optional, and are therefore a condition precedent to an order under s. 31 of the Vaccination Act, 1867." Conceding that the provisions of sub-s. 3 are imperative, it is not a logical sequence that they are a condition precedent; there is no "therefore" in the matter. I am of opinion that the appellant is entitled to our judgment.

BIGHAM J. I am of the same opinion.

Judgment for the appellant.

Solicitors for appellant: *Gibson, Weldon & Bilbrough, for George Pym, Belper.*

W. A.

1901
June 11, 12.

TOLHURST *v.* THE ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900), LIMITED.
THE ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900), LIMITED, AND THE IMPERIAL PORTLAND CEMENT COMPANY, LIMITED *v.* TOLHURST.

Contract—Assignability—Contract to supply Goods—Increase of Burden by Assignment.

T. contracted with the I. Company to supply them for fifty years with at least 750 tons of chalk per week, and so much more as they might require for their manufacture of cement upon a certain piece of land, the chalk to be delivered in convenient daily quantities as required by the company by written notice given on the preceding day. The I. Company, which had a small capital and was doing a comparatively small business, went into voluntary liquidation and transferred all its business and property, and purported to assign this contract, to the A. Company, which was a very powerful company with a very large capital:—

Held, that, as the result of the assignment would be to impose a greater liability and burden upon T., he was not bound to supply chalk to the A. Company.

ACTIONS tried before Mathew J., without a jury, as commercial causes.

The first action was brought by Tolhurst to recover 1785*l.*, the price of chalk sold and delivered by him to the defendants, and for a declaration that he was not under any obligation to supply chalk to the defendants under a contract dated January 5, 1898, and made between him and the Imperial Portland Cement Company. It was recited in that contract that Tolhurst was the owner and occupier of chalk quarries in Northfleet, and that the company were the owners of a piece of land in Northfleet which they had recently purchased from Tolhurst. The first clause of the contract provided that the company would construct a tramway from the point up to which Tolhurst had already constructed a tramway to a convenient spot upon their said land, in all respects proper for the working of traffic in the delivery of chalk as thereinafter mentioned, and would

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permit Tolhurst to use their tramway for the purpose of so delivering chalk, and would keep it in good workable repair so long as it should be required for those purposes. The second clause provided that "when the tramway to be constructed by the company as aforesaid shall be completed Tolhurst will, for a term of fifty years from December 25, 1897, or for such shorter period (not being less than thirty-five years) as he shall be possessed of chalk available and suitable for the manufacture of Portland cement and capable of being quarried and got in the usual manner above water level, supply to the company, and the company will take and buy of Tolhurst, at least 750 tons per week and so much more (if any) as the company shall require for the whole of their manufacture of Portland cement upon their said land, and Tolhurst will provide all rolling stock and traction power and will deliver such chalk by conveying it in waggons . . . . over the tramways aforesaid alongside the wash-mills or stores of the company or other convenient places to be provided by them as the company shall direct; but this agreement shall not preclude Tolhurst from supplying chalk from his said quarries to other persons than the company for ballasting or manufacturing purposes or otherwise." The third clause provided that "the chalk shall be delivered as aforesaid in such convenient daily quantities as the company shall by writing, delivered at the office for the time being of Tolhurst upon his said land before four o'clock of the preceding working day, have reasonably required." The price agreed was 1*s.* 3*d.* per ton.

In October, 1900, special resolutions were duly passed and confirmed that the Imperial Company should be wound up voluntarily. On November 30, 1900, all the land belonging to the Imperial Company was conveyed to the Associated Company, and all the goodwill and connection of the Imperial Company, and the sole use of their trade name, and the full benefit of all pending trade contracts in connection with the said business, including the contract with Tolhurst of January 5, 1898, were assigned to the Associated Company. The Associated Company had been incorporated in 1900, with a nominal capital of 5,000,000*l.*, for the purpose of purchasing and carrying on

various cement manufacturing businesses. The Imperial Company was a company with a small capital which carried on business only at the said works at Northfleet.

On December 12, 1900, notice was given to Tolhurst by letter from the Imperial Company that they were in liquidation, and that their land and business had been transferred to the Associated Company. Tolhurst treated that letter as being a rescission and determination of the contract of January 5, 1898. The Associated Company took possession of the works and business of the Imperial Company, and Tolhurst supplied them with a large quantity of chalk. They claimed to be entitled to the benefit of the contract of January 5, 1898, and to pay 1*s.* 3*d.* a ton for the chalk. Tolhurst denied their right to the benefit of that contract, and claimed 2*s.* a ton for the chalk.

The Associated Company and the Imperial Company brought a cross-action against Tolhurst claiming a declaration that the contract of January 5, 1898, was a valid and binding contract, and that the plaintiff companies, or one of them, are or is entitled to be supplied by the defendant with chalk on the terms of that contract and to have the contract performed by the defendant.

The two actions were tried together before Mathew J., as commercial causes, without a jury.

J. Alderson Foote, K.C., and *A. M. Bremner*, for the Associated Company. The contract made by the Imperial Company with Tolhurst is an assignable contract, and can therefore be enforced by the Associated Company. This is not a contract in which any individual skill, competency, or other personal qualification is involved, and is therefore assignable: *British Waggon Co.* v. *Lea.* (1) If a contract for the supply of goods or for doing work is made without regard to the persons engaged, it is assignable, but not if the individual skill or personal qualification of one party is relied upon by the other. This contract is a mere contract for the supply of goods, and the obligation to supply is limited to the requirements of

(1) (1880) 5 Q. B. D. 149.

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the works upon a specified piece of land; an assignment of the contract could not, therefore, increase the obligations or burden of the other contracting party. The Imperial Company is also a party to this action, and, if the assignment is not binding on Tolhurst, can enforce the contract against him.

H. E. Wright, for the Imperial Company.

Joseph Walton, K.C., and *George Wallace*, for Tolhurst. The Imperial Company was a company with a small capital doing a comparatively small business, and Tolhurst could estimate the extent of his obligations under a contract made with that company to supply all the chalk required for their works. The new company is, however, a very powerful company with a very large capital, and if Tolhurst is bound to supply all the chalk they require for their works on this piece of land his obligations may be enlarged beyond anything contemplated by him. A contract can never be assigned by one party so as to increase the burden upon the other party. This is in effect an attempt to create a new contract without the assent of one contracting party.

The Imperial Company clearly intimated to Tolhurst that, as they were being wound up, they did not intend to continue to carry on their business and would no longer require chalk for their business, and he was entitled to treat the contract as rescinded.

Foote, K.C., replied.

MATHEW J. In these two actions the same point arises, the decision of which will dispose of both actions. The history of the case is as follows: A contract was made between the Imperial Portland Cement Company and Tolhurst for the supply to the company of chalk from Tolhurst's quarries. The material clause of that contract is the second, which provides, omitting what is immaterial, that Tolhurst shall supply and the company take, at least 750 tons of chalk per week, and so much more (if any) as the company shall require for the whole of their manufacture of Portland cement upon their said land, and that Tolhurst shall provide all the necessary

rolling stock. That clause goes on to provide that "this agreement shall not preclude Tolhurst from supplying chalk from his said quarries to other persons than the company for ballasting or manufacturing purposes or otherwise." Then the third clause provides that "the chalk shall be delivered as aforesaid in such convenient daily quantities as the company shall, by writing delivered at the office for the time being of Tolhurst upon his said land before four o'clock of the preceding working day, have reasonably required." Now the Imperial company is in articulo mortis, that is, it has been ordered to be liquidated or wound up, and no doubt it is the intention of those interested in the company that it shall be extinguished. The reason is that this company has parted with all its land and business to another company, the Associated Portland Cement Manufacturers (1900), Limited. The Imperial Company was a company with a small capital and a comparatively small business. The new company is a combination of a number of competing manufacturers which would, in other countries, be called a trust, the object being to stop competition and obtain control of the market. That new company has a capital of 5,000,000*l.*, and is therefore a very large and powerful company. Now, when it was resolved to transfer the business in question to this new company a notice was given to Tolhurst, and as a man of business he would see that it was intended to do what has been done in so many cases, that is, to extinguish the one company and create another which would absorb all the property of the former company. He came to the conclusion, and I think reasonably, that the first company did not intend to carry out the contract made with him, as they were about to be extinguished, and that he might treat it as rescinded. The old company is made a party to this action, but there can be no doubt as to its condition, and I have no materials before me upon which I can say that it has any assets or could be kept alive for any practical purpose. It is argued for the Associated Company that that is all immaterial; that there was an assignment of a chose in action; and that they are entitled to all the rights and benefits

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of the contract made between the Imperial Company and Tolhurst. It is said that there is no difficulty about the assignment of any contract so long as there is no question of any personal confidence or ability involved on the part of one of the contracting parties. It is argued that this is a contract for the supply of chalk, and that there is, therefore, no question of any personal confidence or ability in respect of the person who buys the chalk; and that it is like the case relating to the supply of waggons, in which a company which had hired waggons ceased to exist and the right to use the waggons was transferred to another company. It is said that this case is entirely analogous. The contention of the other side is that it is proposed to put upon Tolhurst a new contract with the Associated Company which he never entered into; that under the original contract Tolhurst might well be able to calculate how much chalk he would be required to supply to the Imperial Company, which was a small company; that he had reserved the right to supply chalk to others; and that he probably thought that he could well undertake the obligations of that contract and comply with the notice required to be given by the Imperial Company. The new company claims to have the right under the contract to require not only the 750 tons per week mentioned in the contract, but also so much more as the new company might require for their manufacture of Portland cement upon the said land. The new company might extend its buildings and works according to the requirements of its trade, and might call upon Tolhurst to supply all the additional chalk for those extended works. It is pointed out that Tolhurst would be obliged under the contract to supply all the chalk which the new company might require. To my mind it is perfectly clear that the Associated Company is endeavouring to impose upon Tolhurst a contract into which he never entered, and that he is entitled to say that he did not make that contract. I cannot accept the contention that only those contracts in which personal confidence or ability is involved cannot be assigned. Whenever, by reason of change of business or change of parties, the result of an assignment would be to

impose upon one of the contracting parties a greater liability than he ever intended to assume, the contract cannot be assigned. Therefore, in both these actions there will be judgment for Tolhurst.

Judgment for Tolhurst in both actions.

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Solicitors for Associated Company: *Ashurst, Morris, Crisp & Co.*

Solicitors for Imperial Company: *Hays, Schmettau & Dunn.*

Solicitors for Tolhurst; *Sismey & Cooke, for Tolhurst, Lovell & Clinch, Gravesend.*

P. B. H.

ELLIOT, APPELLANT; PILCHER, RESPONDENT.

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June 6, 12.

Adulteration—Milk Prosecution—Defence—Written Warranty—Application of Warranty to Future Deliveries of Milk—Evidence—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 25.

In a prosecution under the Sale of Food and Drugs Act, 1875, for adulterating milk, where the defendant relies on s. 25 as a defence, it is sufficient if, in order to prove that he bought the milk in question with a written warranty, he prove that he had contracted with dairymen to supply him with milk daily; that they gave him a written warranty with respect to all milk which they should so supply, and that the milk in question was sold and supplied to him under that contract and warranty. He need not prove a specific written warranty with respect to each delivery; nor need there be evidence in writing to connect the milk in question with the warranty on which he relies.

Laidlaw v. *Wilson*, [1894] 1 Q. B. 74, followed.

Harris v. *May*, (1883) 12 Q. B. D. 97, and *Robertson* v. *Harris*, [1900] 2 Q. B. 117, not followed.

CASE stated, under the Summary Jurisdiction Acts and pursuant to an order of the High Court of Justice, by seven justices of the borough of Margate.

An information was laid by the appellant, an inspector under the Sale of Food and Drugs Act, 1875, charging the respondent with an offence under s. 9 of that Act, namely, that he did unlawfully, with intent that the same should be sold in its altered state without notice, abstract from a certain article of

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food—to wit, milk—a part of such article so as to affect injuriously its quality, substance, or nature. (1)

At the hearing of the information before the justices the following facts were proved or admitted:—

On July 29, 1900, the appellant purchased a pint of milk from the respondent's manager in the prescribed manner, and submitted the third portion of it to the public analyst, who certified that there was a deficiency of fat or cream in the sample. The respondent, a retailer of milk, had given notice to the appellant that he intended to rely, under s. 25 of the Act (2), on a written warranty from the firm of dairymen from whom he had purchased the milk. A member of that firm deposed that the firm had made a verbal contract with the respondent in January, 1897, to supply him with milk, and that the contract had continued up to the hearing of the information without suspension, the firm having continuously supplied the respondent with milk daily in quantities varying from twenty to forty-eight gallons. In July, 1899, the firm, at the respondent's request, gave him the following warranty in writing: "We hereby warrant that each and every supply of milk sent by us to you shall be new milk unadulterated and with all its cream."

The justices found as a fact that the milk sold by the respondent to the appellant was milk supplied to the respondent under the above-mentioned contract and warranty. They considered that the respondent had proved to their satisfaction the matters required by s. 25 of the Sale of Food

(1) 38 & 39 Vict. c. 63, s. 9: "No person shall, with the intent that the same may be sold in its altered state without notice, abstract from an article of food any part of it so as to affect injuriously its quality, substance, or nature, and no person shall sell any article so altered without making disclosure of the alteration, under a penalty in each case not exceeding twenty pounds."

(2) Sect. 25: "If the defendant in any prosecution under this Act prove to the satisfaction of the justices or Court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution. . . . ."

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and Drugs Act, 1875, and accordingly discharged him from the prosecution.

The points raised by the appellant were, first, that the warranty formed no part of the contract; secondly, that there was nothing to shew on the face of it that the warranty applied to the particular sale of milk; and, thirdly, that there must be a specific warranty with each delivery of milk.

The justices refused to state a case on the ground that no question of law arose; but subsequently stated the present case in compliance with the order of the Court.

H. Stuart Sankey, for the appellant. There was no sufficient evidence before the justices to connect the written warranty with the supply to the respondent of the milk in question. There should be evidence in writing for that purpose: *Robertson* v. *Harris*. (1) In order to make himself safe in respect of the sale of a specific article, a person who seeks the protection of s. 25 of the Sale of Food and Drugs Act, 1875, must shew that he had a proper specific warranty in writing in respect of that article from his vendor: *Harris* v. *May* (2), judgment of Lord Coleridge C.J. Sect. 25, therefore, does not apply to protect the respondent.

[*Laidlaw* v. *Wilson* (3) was also referred to.]

No counsel appeared for the respondent.

Cur. adv. vult.

June 12. BIGHAM J. In this case the information was laid under s. 9 of the Sale of Food and Drugs Act, 1875, which enacts that "no person shall, with the intent that the same may be sold in its altered state without notice, abstract from an article of food any part of it so as to affect injuriously its quality, substance, or nature." The respondent was charged only with the offence created by those words; but s. 9 contains the additional words: "and no person shall sell any article so altered without making disclosure of the alteration." The question we have to decide is whether or not the respondent

(1) [1900] 2 Q. B. 117. (2) 12 Q. B. D. 97, at p. 99.
(3) [1894] 1 Q. B. 74.

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has, under the circumstances stated in the case, brought himself within the protection of the provisions of s. 25 of the same Act. [The learned judge read s. 25.] The only point we have to consider with respect to this section is, I think, the requirement that the person who is being prosecuted should prove that he purchased the article with a written warranty. For the purposes of this case we may assume that the respondent complied with the other requirements of the section, and that if he proves that he purchased with a written warranty, he is entitled to the protection which the section gives. Before I consider that point I may say, for my own part, that I do not think s. 25 applies to the particular offence with which the respondent was charged. It certainly applies to offences under s. 6, namely, the sale of food or drugs not of the nature, substance, and quality of the article demanded by the purchaser. It probably also applies to offences under s. 7, but not, I think, to offences under ss. 3 and 4. Here the respondent is not charged with the offence of selling at all, but with abstracting part of the article, so as to affect it injuriously, with the intent that the article might be sold in its altered state. In the case as stated there is no finding that the respondent did in fact abstract cream from the milk; and if it had been shewn that he had done so with the intent that the milk should be sold in its altered state, it is clear that s. 25 would not protect him. I will assume, however, as the justices have assumed, that s. 25 does apply to the present case, and I will deal with it upon that assumption. The facts found in the case are that the respondent began purchasing milk from a firm of dairymen in 1897, and the firm had continuously supplied him daily for about two years with milk in varying quantities. Probably those deliveries were under such circumstances that a promise to pay arose on each of them. In July, 1899, at his request, the firm gave him a written warranty in these terms: "We hereby warrant that each and every supply of milk sent by us to you shall be new milk unadulterated and with all its cream." The justices have found as a fact, on sufficient evidence, that the milk purchased by the appellant from the respondent was milk supplied to the respondent under the contract and

warranty. I agree that the delivery of the milk must in fact be a delivery covered by the warranty, and here that fact has been found for the respondent. In my opinion, the respondent has complied with the requirement of s. 25 with respect to a written warranty, because he has proved that he bought the milk in question from the firm under a warranty applying to that particular delivery of milk. There can be no doubt that he could sue the firm for breach of warranty of that milk. It is said, however, that he has not proved enough, and authorities were relied on to shew that he had not done enough to entitle him to the protection of s. 25. In *Harris* v. *May* (1) the information was laid under s. 6, to which s. 25 undoubtedly applies. The respondent bought from the appellant, who was selling milk from cans in Bristol, a fluid which, on analysis, was found to consist of milk and 10 per cent. of added water. The appellant proved that about three weeks before the sale he had made a contract in writing with his vendor, whereby the latter agreed to sell and supply to him a certain quantity of new and pure milk every day for six months. The warranty, therefore, was in respect of milk to be supplied in the future. The appellant relied on this contract as being a written warranty sufficient to satisfy s. 25. Lord Coleridge C.J. was of opinion that it was not. He said (2): "It seems clear that the Legislature meant that a person seeking to protect himself against the penalty, and wishing to make himself perfectly safe in respect of the sale of a specific article, must shew that he had a proper specific warranty in writing in respect of that article from his vendor. The appellant here has not shewn that." I cannot see why that warranty was not a proper specific warranty in writing which satisfied the provisions of the Act. Lord Coleridge may possibly have meant that there must be some writing to connect the article sold with the warranty, and attached to the article. But how is that arrangement to be carried out? Is the purchaser to attach it when he receives the milk, or is the original vendor to attach it to each can as it is delivered? In my view the requirements of s. 25 were satisfied in that case,

(1) 12 Q. B. D. 97. (2) 12 Q. B. D. at p. 99.

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and I can give no satisfactory explanation of the decision. In *Farmers and Cleveland Dairy Co.* v. *Stevenson* (1) the contract contained a warranty with respect to all milk to be delivered under the contract, and in addition there was a label attached to each can of milk containing the words, "Warranted genuine new milk with all its cream on." The Divisional Court held that the warranty was sufficient to fulfil the requirements of the statute; but their decision apparently did not turn at all upon the fact that the label was attached containing those words, and I do not think that circumstance ought to have made, or did make, any difference. In the next case—*Laidlaw* v. *Wilson* (2)—there was a written contract for the sale of lard which stated, "We have this day sold you" (the respondent) "three tons of Kilvert's pure lard." The respondent proved that he sold it in the same state as that in which he purchased it. The Divisional Court—Charles and Wright JJ.—held that the contract contained a sufficient warranty to satisfy s. 25; that the invoice was no part of the contract, and that it was in the contract, and in the contract alone, that the warranty which the statute required must be sought. In arriving at that conclusion it became necessary to distinguish *Harris* v. *May* (3), and Charles J. said, with reference to Lord Coleridge's judgment in that case: "But, on looking at his judgment as a whole, I think that what he really meant was that it was not such a warranty as would cover the specific delivery of milk on April 12, in the absence of some written evidence that that specific delivery was made under the contract." Lord Coleridge clearly did not say that, and, in my view, he did not mean that. In *Laidlaw* v. *Wilson* (2) the Court certainly did not lay down that there must be something in writing to cover the specific delivery. Wright J. said (4): "The word 'pure' in the contract of December 17 amounts to an agreement as an essential part of the contract that the lard supplied should be pure, and that is, in my opinion, a sufficient warranty of its purity within the meaning of the section." In my view the two decisions—*Harris* v. *May* (3) and *Laidlaw* v. *Wilson* (2)—are irreconcil-

(1) (1890) 60 L. J. (M.C.) 70.
(2) [1894] 1 Q. B. 74.
(3) 12 Q. B. D. 97.
(4) [1894] 1 Q. B. at p. 78.

able, and the latter is to be preferred. In *Robertson* v. *Harris* (1) an attempt seems to have been made to follow Charles J.'s suggestion with respect to the explanation of Lord Coleridge's judgment in *Harris* v. *May*. (2) The explanation adopted by the Court seems to have been that, in order to make a warranty good with respect to particular goods under s. 25, there must be some writing to earmark the goods and connect them with the warranty—some document describing them so that any one reading it might connect the warranty with the particular article sold. I can find nothing in the Act to make the person who sells by retail subject to so onerous a condition. I am of opinion that we ought to follow the decision in *Laidlaw* v. *Wilson* (3), and to hold that, if s. 25 applies to this case at all, there is a written warranty which brings the respondent within the protection of that section. Our answers to the points raised by the appellant and stated in the case, therefore, are: To the first, that the warranty applied to the milk sold by the firm of dairymen to the respondent; to the second, that it is not necessary to shew on the face of the warranty that it applies to the particular milk sold, and that it is enough to shew the connection by evidence; to the third, that the statute requires no specific warranty with each delivery of milk, but merely that it be sold with a warranty, and that the warranty once given applies to successive deliveries of milk after it has been given, and need not be repeated with each delivery.

RIDLEY J. I am of the same opinion, and should have nothing to add were it not for the decision in *Robertson* v. *Harris* (1), to which decision I was a party. In *Laidlaw* v. *Wilson* (3) there was an invoice, and Charles J. said that the invoice could be treated as written evidence, connecting the warranty found in the contract with the sale of the particular consignment. His words were: "In the present case there is evidence that the particular parcel of lard was delivered under the contract, the delivery having been accompanied by an invoice which describes the lard in the same terms as those

(1) [1900] 2 Q. B. 117. (2) 12 Q. B. D. 97.
(3) [1894] 1 Q. B. 74.

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RILEY J.

contained in the contract. The invoice, however, is material, not as itself containing the warranty of purity, but as earmarking the particular parcel as having been delivered under a contract in which a written warranty of purity was contained." He interpreted the judgment of Lord Coleridge in *Harris* v. *May* (1) as proceeding upon this—that there must, in order to satisfy s. 25, be "some written evidence that the specific delivery was made under the contract." In *Robertson* v. *Harris* (2) I adopted what he said. I now think that *Laidlaw* v. *Wilson* (3) was rightly decided, and that *Robertson* v. *Harris* (2) was not necessarily wrong, although I did adopt that principle in my judgment. I do not now think that, in order to satisfy the statute, there must be evidence in writing to connect the warranty contained in the contract with the particular consignment.

Judgment for the respondent.

Solicitors for appellant: *Warren, Murton & Miller.*

(1) 12 Q. B. D. 97. (2) [1900] 2 Q. B. 117.
(3) [1894] 1 Q. B. 74.

W. A.

PEARKS, GUNSTON & TEE, LIMITED, APPELLANTS; KNIGHT, RESPONDENT.

THE SAME, APPELLANTS; VAN TROMP, RESPONDENT.

1901
Aug. 9.

Adulteration — Butter — Process of mixing Milk with Butter — Increased Percentage of Water—Sale of Food and Drugs Act, 1875 (38 *& 39 Vict. c.* 63), *s.* 6.

In the ordinary process of making butter a large proportion of the water in the milk or cream from which it is made is eliminated. The appellants, after butter had been made in the ordinary way, mixed milk with it, for the purpose of increasing its weight, by a process which had the effect of retaining the water in the milk, and causing an excessive quantity of water in the butter so treated. They sold the butter so treated to a purchaser as butter:—

Held, that they had committed the offence specified in s. 6 of the Sale of Food and Drugs Act, 1875, namely, selling to the prejudice of the purchaser an article of food not of the nature, substance, and quality of the article demanded by him.

THESE were two cases stated, under the Summary Jurisdiction Acts, by the stipendiary magistrate for the Staffordshire Potteries.

Informations were preferred before the magistrate by the respondent in each case charging the appellants with having unlawfully sold to the prejudice of the purchaser butter not of the nature, substance, and quality of the article demanded by him, contrary to the provisions of s. 6 of the Sale of Food and Drugs Act, 1875. (1)

In *Pearks, Gunston & Tee, Limited* v. *Knight*, the following facts were stated in the case:—

The appellants were grocers and provision merchants, and the respondent, an inspector appointed under the Sale of Food and Drugs Acts, caused to be purchased at their shop one half-pound of butter for analysis.

The public analyst certified that the butter contained 22·53

(1) 38 & 39 Vict. c. 63, s. 6: "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding 20*l*. . . . ."

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per cent. of water, and that this was at least 6 per cent. too much water.

Water is a natural constituent of butter, and is always present in butter to a considerable, though varying, extent. Butter is made from milk or cream, or both. It is not unusual to blend two or three different kinds of butter. Milk contains about 88 per cent., and cream about 50 per cent., of water. There is no statutory standard as to the proportion of water butter may contain, the Board of Agriculture having made no regulations as to butter under s. 4 of the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51).

The 6 per cent. excess of water which the appellants' butter was certified to contain was not the result of the manufacture of butter from milk or cream, but was caused by the addition to butter already manufactured of extraneous milk, which was incorporated by some process with the butter, for the purpose of increasing its weight by means of the extra water thereby introduced.

The magistrate was of opinion that, of the 22·53 per cent. of water found in the butter, 6 per cent. was excessive, and was caused by the addition of the milk in the manner stated, and he held that the process of adding the milk to the butter, being for the purpose of the addition of water, constituted an offence under s. 6 of the Sale of Food and Drugs Act, 1875, in that an article was sold not of the nature, substance, and quality demanded by the purchaser, the same being adulterated with water.

The question for the opinion of the Court was whether the magistrate's decision was correct in point of law.

Joseph Walton, K.C. (*H. D. Bonsey* with him), for the appellants. The conviction was wrong. What was sold to the respondent was of the nature, substance, and quality of the article demanded by him, i.e., butter. Sect. 3 of the Margarine Act, 1887 (50 & 51 Vict. c. 29), defines "butter" as meaning "the substance usually known as butter, made exclusively from milk or cream, or both, with or without salt or other preservative, and with or without the addition of colouring

matter." So long as the butter sold satisfies that definition, as it did here, s. 6 of the Sale of Food and Drugs Act, 1875, does not apply. This butter was made exclusively from milk or cream, and it matters not that a process of making it was adopted, which had, and was intended to have, the result that it contained a larger percentage of water than butter produced by a different method. There is no fixed percentage of water in the case of butter. By the Sale of Food and Drugs Act, 1899, s. 4, the Board of Agriculture may make regulations for determining what deficiency in any of the normal constituents of genuine butter, or what addition of extraneous matter or proportion of water, in any sample of butter, shall raise a presumption that the butter is not genuine or is injurious to health. But no such regulations have been made. This is not like the case of a manufactured article, where the percentage of water can be exactly fixed, and has, therefore, been fixed by statute: see the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 6. Butter is the product of milk—a natural article which always does contain a large proportion of water. The making of this butter was not at an end until the additional milk had been incorporated by the further process. The fact that there was more water than if the process had stopped at an earlier stage constitutes no offence. No particular process of making butter is anywhere prescribed.

Danckwerts, K.C. (*B. C. Brough* with him), for the respondent, was not heard.

In *Pearks, Gunston & Tee, Limited* v. *Van Tromp*, the facts, the question for the opinion of the Court, and the arguments were substantially the same as in the first case.

Horace Avory, K.C. (*H. D. Bonsey* with him), for the appellants.

Danckwerts, K.C. (*B. C. Brough* with him), for the respondent, was not heard.

WILLS J. I am clearly of opinion that our judgment should be for the respondent in each of these cases. The

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WILLS J.

appellants were convicted under s. 6 of the Sale of Food and Drugs Act, 1875. [The learned judge read s. 6.] The purchaser in each case demanded butter. What did he get? He got something which had been butter, because it began by being butter; but by some ingenious process, the nature of which is probably a trade secret, milk had been added to it, and care was taken that the milk should be added in such a way that it should not become butter. It is not simply a question of whether the butter as sold contained 20 per cent., or 25 per cent., or any other percentage, of water. The material thing is that the very object of the process to which this butter was subjected was that the milk added should not become butter, so that a greater proportion of water, which in the ordinary process of making butter would be eliminated, should still be in the butter. By reason of the presence of the added milk this was a spurious compound: it was not a genuine article. It was the genuine article saturated with a substance as to which care was taken that it should not in that process become the genuine article. It does not matter what the motive was. The magistrate has found that this mixing of milk with the butter was dishonestly done; but if the act were ever so honest in intention, that would be no answer, where the question is one, as in this case, only under the first part of s. 6.

KENNEDY J. I am entirely of the same opinion.

Judgment for the respondents.

Solicitors for appellants: *Neve, Beck & Kirby.*
Solicitors for respondents: *Thomas White & Sons.*

W. A.

MARCHANT *v.* MORTON, DOWN & CO.

1901
May 7;
June 28.

Assignment of Debt—Same Debt assigned to different Persons—Priority—Notice to Debtor—Debt due to Firm—Assignment by One Partner by Deed—Validity.

A debt due to a firm was assigned by one partner to the defendants by writing, and was subsequently assigned by the other partner to the plaintiff by deed. The plaintiff gave notice to the debtor before the defendants did so :—

Held, that there was a valid equitable assignment of the debt to the plaintiff, and that, having first given notice to the debtor, he was entitled to the debt in priority to the defendants.

INTERPLEADER ISSUE tried before Channell J. without a jury.

This interpleader issue was directed to try the question whether the plaintiff was entitled as against the defendants to a sum of 104*l.* paid into court by Copestakes & Co. The firm of T. J. Woolls & Co., in which the partners were T. J. Woolls and J. Allen, supplied goods to Copestakes & Co., the course of business being that they were paid on the 11th of each month for the goods supplied during the previous month. On December 21, 1900, Woolls signed a document which the defendants alleged to be an assignment to them of the money to become payable to T. J. Woolls & Co. from Copestakes & Co. on January 11, 1901, and on January 11 the defendants gave notice of that assignment to Copestakes & Co. On January 4, 1901, Allen executed a deed in the name of T. J. Woolls & Co. which purported to assign the same debt to the plaintiff, who gave notice thereof to Copestakes & Co. upon the same day. Woolls had not told Allen that he had assigned the debt to the defendants. On January 4 all the goods to be paid for on January 11 had been supplied to Copestakes & Co.

Adam Walker, for the plaintiff.
J. R. Atkin, for the defendants.

The arguments sufficiently appear in the judgment.

Cur. adv. vult.

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June 28. CHANNELL J. read the following judgment:—This interpleader issue raises questions of some difficulty. Each of the parties to the issue claims in the capacity of assignee of a debt, and questions were argued as to the validity of each assignment and also as to the priority between them. The facts were shortly as follows: A firm consisting of T. J. Woolls and J. Allen carried on business as T. J. Woolls & Co., as makers of boxes. They supplied boxes to Messrs. Copestakes & Co., the City wholesale house, amongst other persons, and the course of business between them was that they were paid on the 11th of each month for the boxes supplied in the previous month. T. J. Woolls, on December 21, 1900, signed the document which the defendants rely on as an assignment of the money to become due on January 11, 1901, to T. J. Woolls & Co. from Copestakes & Co., and on January 11, 1901, the defendants gave notice to Copestakes & Co. of that assignment. On January 4, 1901, the other partner, J. Allen, signed the document relied on by the plaintiff as an assignment to him of the same debt, and he gave notice of it to Copestakes & Co. on the same day. Thus the plaintiff's assignment is subsequent in date to the defendants' assignment, but the notice of it is before the notice of the defendants' assignment. The first question I have to consider is the priority, and next the validity of that assignment, which would have priority, if both were valid. Assuming that both assignments were valid, I am of opinion that the plaintiff's assignment would take priority. Mr. Atkin, for the defendant, quoted some cases relating to notices given to army agents of assignments of money becoming due to officers on resigning their commissions: see *Buller* v. *Plunkett* (1); *Johnstone* v. *Cox*. (2) I think, however, that these cases proceeded entirely on the ground that until the officer was gazetted there could be no debt. In the present case there was a debt when the boxes were supplied, although the price was by the terms of business not then payable. It was debitum in præsenti solvendum in futuro; and, at all events, when the plaintiff's assignment of January 4 was made all the boxes to be paid for on January 11 had been supplied.

(1) (1860) 1 J. & H. 441. (2) (1880) 16 Ch. D. 571.

It is, of course, possible that the money due by Copestakes & Co. on January 11 would include the price of boxes supplied after December 21, the date of the defendants' assignment. I do not think that makes any difference, but at all events it does not affect the plaintiff's assignment. That being so, I think the priority as between the two assignments, assuming each to be valid, is governed by the dates of the notices. The recent case of *Ward* v. *Duncombe* (1) in the House of Lords shews that it is not easy to state the exact ground upon which the equitable doctrine as to priority being gained by the first notice proceeds, and it therefore becomes in some cases difficult to apply the doctrine, but I think the case before me is quite concluded by authority. That raises the question whether the assignment under which the plaintiff claims is a valid one, and that is the most difficult question in the case. The facts as to that are these. The plaintiff is a judgment creditor of T. J. Woolls & Co. After the plaintiff obtained his judgment T. J. Woolls promised to assign to him some good book debts due to T. J. Woolls & Co. if he would delay putting in execution. He did not mention this particular debt due from Copestakes & Co., and in fact he had already assigned that to the defendants in this issue, but had not told his partner that he had done so, and, according to his partner's evidence, had misappropriated the money which he had obtained from the defendants. The plaintiff, not getting the assignment promised him by Woolls, communicated with the other partner Allen, and he then signed the document of January 4. This was prepared by the plaintiff's solicitor, and is in the form of an indenture. It begins with the words "this indenture," and is made between "T. J. Woolls and J. Allen, trading in co-partnership as T. J. Woolls & Co. of the one part, and T. B. Marchant of the other part." It purports to assign the debt in question. It contains the word "covenant," and it ends "in witness whereof the parties have set their hands and seals." There is a wafer in the usual place, and against it is the signature "T. J. Woolls & Co., by J. Allen, a partner in the said firm," and by the attestation clause it purports to be

(1) [1893] A. C. 369.

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"signed, sealed, and delivered" by John Allen. I had no direct evidence that Allen did put his finger on the seal and deliver it as his act and deed in the usual way, but I presume that he did so. It is objected that this document does not bind the firm because a partner has no authority to execute deeds in the name of his co-partner or to bind his co-partner by a deed. For this the case of *Harrison* v. *Jackson* (1) is quoted. That case is treated as an authority in Lindley on Partnership, and I think recognised by s. 6 of the Partnership Act, 1890, which says that an act or instrument relating to the business of the firm and done or executed in the firm name by any one authorized is binding on the firm, "provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments." I think, therefore, that this document cannot be treated as the deed of T. J. Woolls. He could not be sued on it in covenant, and the effort which has been made to give to this transaction the additional solemnity of a deed has failed. It does not, however, seem to me to follow that the assignment may not be good. Mr. Adam Walker contends that the words of s. 25, sub-s. 6, of the Judicature Act are conclusive in his favour to shew that any absolute assignment in writing of which notice has been given is good. I think, however, that that sub-section is merely machinery. It enables an action to be brought by the assignee in his own name in cases where previously he could have sued in the assignee's name, but only where he could so sue. It however does go to shew that (of which I think there could have been no doubt) a deed is not necessary. The question which I have to consider is whether there is a good equitable assignment. I do not find any direct authority upon the point, but I cannot think that the ineffectual effort to make it the deed of Woolls by putting a seal to it and getting one partner to deliver it as a deed of the firm prevents its operating as a good assignment, a deed being unnecessary. As a contract to assign would amount in equity to an assignment, I think this must be a good assignment, and I so hold. I may observe that, as between the partners, I think it clearly

(1) (1797) 7 T. R. 207; 4 R. R. 422.

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good. T. J. Woolls could not effectively object to it, for, although it is true that he had already dealt with this asset of the firm, he had concealed that fact from his partner. The view which I take of the priority and of the validity of the plaintiff's assignment makes it unnecessary to consider whether the defendants' assignment was good, and I need only say that there would be very considerable difficulty in holding it good. If, however, the plaintiff's assignment were bad, I suppose Mr. Atkin is right in saying that, upon the form of the issue, the defendants would be entitled to succeed. On the whole, I consider that the plaintiff is entitled to succeed.

Judgment for the plaintiff.

Solicitor for plaintiff: *H. Anderson.*
Solicitors for defendants: *Williams, Goss & Co.*

P. B. H.

[IN THE COURT OF APPEAL.]

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Aug. 2.

ALDERSON *v.* PALLISER AND ANOTHER.

County Court—Jurisdiction—Application for Judgment Summons—Insufficiency of Affidavit—Waiver—Prohibition — County Court Rules, 1889, *Order* XXV., *rr.* 13, 14*a*, *Form* 52A.

An affidavit in support of an application for leave to issue a judgment summons out of the district of the county court in which judgment had been obtained was defective as not being in accordance with Form 52A of the County Court Rules, 1889. Leave was granted and an order for commitment made. On an application for a writ of prohibition:—

Held, that the want of jurisdiction appeared on the face of the proceedings, and could not be waived.

APPEAL from a decision of a Divisional Court refusing an application for two writs of prohibition to the judge of a county court.

It appeared that the plaintiff obtained judgment in the county court against the two defendants, and the judge made an order upon them for payment of the amount of the judgment by instalments. The order not having been complied with, the plaintiff applied for leave to issue a judgment summons. Neither

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of the defendants, who carried on business in partnership, dwelt or carried on business or was employed within the district of the county court, and the application by the plaintiff for a judgment summons required to be supported by an affidavit in the Form 52A of the County Court Rules, 1889. The affidavit filed by the plaintiff omitted several particulars set out in the form, but the judge of the county court granted leave for the issue of the summons. The summons, with a copy of the affidavit, was accordingly served on the defendants. The summons was indorsed as issued by leave of the judge, and there was the usual foot-note to the effect that the debtor might forward to the registrar of the Court an affidavit setting forth any facts which he might wish to be before the Court prior to an order being made on the summons. Each of the defendants made an affidavit in which he described himself as without means, and stated that the best offer that was possible was to pay 2*s.* a month. The county court judge made orders for the committal of each of the defendants, who applied at chambers for writs of prohibition, which were refused on the ground that the defect in the jurisdiction of the county court judge had been waived by the defendants. The Divisional Court (Ridley and Bigham JJ.) affirmed the order of the judge at chambers.

The defendants appealed.

Lowenthal, for the defendants. The action taken by the defendants did not amount in fact to waiver of the defect of jurisdiction; but, assuming that it amounted to a waiver, this was a defect apparent on the face of the proceedings, and the Court will take note of the defect whatever course the party concerned may take. In *McIntosh* v. *Simpkins* (1) each of the learned judges pointed out that an affidavit in the prescribed form is necessary to give the judge jurisdiction. In *Farquharson* v. *Morgan* (2) the defect was on the face of the proceeding, and it was held that there could be no waiver. Davey L.J. pointed out that the parties cannot by agreement confer upon any Court or judge a coercive jurisdiction which the Court or judge does not by law possess. In *Moore* v.

(1) [1901] 1 Q. B. 487. (2) [1894] 1 Q. B. 552.

Gamgee (1) it does not appear that the defendant did not, when the action was commenced, carry on business within the district of the county court. If he did, there would be no defect on the face of the proceedings. [He referred also to *Broad* v. *Perkins*. (2)]

Whateley, for the plaintiff. First, the conduct of the defendants in filing an affidavit with an offer to pay a certain amount was a waiver of the defect in the plaintiff's affidavit. Second, such want of jurisdiction as existed in this case can be waived. On a proper affidavit the judge had jurisdiction to make the committal order, so that it was not a case in which, as Lord Halsbury points out in *Farquharson* v. *Morgan* (3), the Court has to protect the prerogative of the Crown by prohibiting an inferior Court from proceeding in matters in which it is apparent it has no jurisdiction. This case is on the same footing as *Moore* v. *Gamgee* (1), in which Cave J. pointed out the distinction between cases in which there is no jurisdiction to entertain the action and cases in which there is no want of jurisdiction over the subject-matter of the action, but leave is required before it can be adjudicated upon. In that case it must have appeared that the defendant was out of the jurisdiction, and that the rule as to obtaining leave to sue had not been observed—yet there it was held to be an objection which could be waived. If there is a want of jurisdiction it does not appear on the face of the proceedings, and can be and has been waived. In determining whether coercive jurisdiction can be given by consent, the answer must depend on the nature of the consent given, as, for instance, a waiver of personal service would remove the objection to that requirement. [He referred to *Mouflet* v. *Washburn* (4); *Jones* v. *Owen* (5); *Jones* v. *James*. (6)]

Lowenthal, in reply.

VAUGHAN WILLIAMS L.J. This is an appeal from the judgment of a Divisional Court refusing to grant two

(1) (1890) 25 Q. B. D. 244.
(2) (1888) 21 Q. B. D. 533.
(3) [1894] 1 Q. B. 552.
(4) (1886) 54 L. T. 16.
(5) (1848) 5 D. & L. 669.
(6) (1850) 19 L. J. (Q.B.) 257.

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writs of prohibition, and in my judgment the appeal must succeed.

It is conceded that, in view of the decision in *McIntosh* v. *Simpkins* (1), the existence of an affidavit substantially conforming to the form given in the Act is a condition precedent to the jurisdiction to make such an order as was made in this case. That being so, the question is whether the absence of this condition precedent appears on the face of the proceedings. In my opinion it clearly does. It is apparent on the affidavit, which is part of the proceedings, because, before the judge could have jurisdiction to make the order, he was bound to have the affidavit before him. We have it, therefore, that a statutory condition precedent to the jurisdiction is wanting, and that the defect appears on the face of the proceedings. It is said that in spite of these facts prohibition should not go, because there was a waiver of the objection by reason that the judgment debtor, in compliance with the invitation contained in the note at the foot of the summons, sent an affidavit in which he stated that he had no means, and asked the Court to make an order that he should only pay 2*s*. a month. I will assume, for the purpose of this judgment, that this action on the part of the judgment debtor amounted to waiver, if there could be waiver, though I must not be taken to say that it did amount to waiver. In my judgment the action taken by the judgment debtor does not prevent the issue of a writ of prohibition, because, as is shewn by the decisions, there can be no waiver of a want of jurisdiction appearing on the face of the proceedings. I have only a few words to say as to the cases that have been cited. *Farquharson* v. *Morgan* (2) is a clear authority for the proposition that where the absence of jurisdiction appears on the face of the proceedings in an inferior Court, the Court is bound to issue a prohibition even though the applicant has acquiesced in the proceedings. It is impossible in the face of the judgment in *McIntosh* v. *Simpkins* (1) to say that absence of jurisdiction does not appear on the face of the proceedings in the case before us.

(1) [1901] 1 Q. B. 487. (2) [1894] 1 Q. B. 552.

In *Jones* v. *James* (1) it was no doubt necessary for the exercise of the jurisdiction of the county court judge that there should have been a granting of leave to serve a summons out of the jurisdiction. It appears on the face of the proceedings that leave was granted. The leave was granted in October, 1847, but the service was not effected till January, 1850. In that state of things the proceedings were not void ab initio, but the objection arose in the course of the case, and it was held that the objection could be waived. In *Mouflet* v. *Washburn* (2) there was not a total absence of jurisdiction. There was an action in the High Court and a counter-claim in respect of a matter which could not be tried in the county court without consent. Sect. 26 of the County Court Act, 1856, provided for that consent being given. It was clear that there had been a waiver, if it was possible that there could be one, and the Court decided that it was a case of irregularity in the course of the proceedings which could be waived. This is clear if the judgment of Hannen J. is looked at. It is plain that in both cases the Court treated the facts upon which the application for prohibition was based as shewing mere irregularities of procedure, and not as relating to preliminary matters essential to jurisdiction. With regard to *Moore* v. *Gamgee* (3), I say nothing as to whether the facts justified the conclusion at which the Court arrived; but it is clear that Cave J. decided the case on the ground that what was said to be waived was mere matter of procedure. Under these circumstances none of the cases cited stand in the way, and, as I said in the course of the case, although there may not seem to be great merits in the objection that is raised to the exercise of jurisdiction, any one acquainted with the county court procedure would know that the issuing of a summons to a person at a great distance from the Court from which the process issues might inflict great hardship if the person to whom it issued were obliged to make a journey in order to raise an objection to jurisdiction. I have no doubt it was from this point of view that the Legislature has said that the conditions imposed before a man at a

(1) 19 L. J. (Q.B.) 257. (2) 54 L. T. 16.
(3) 25 Q. B. D. 244.

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distance can be summoned shall be essential preliminaries to the jurisdiction of the Court to issue the summons. I agree with the view expressed by Davey L.J. in *Farquharson* v. *Morgan* (1), that coercive jurisdiction which the Court does not by law possess cannot be conferred on it by agreement of the parties. For these reasons I think that this appeal must be allowed.

STIRLING L.J. I am of the same opinion. I entirely agree with the view that preliminaries to a jurisdiction which deals with the liberty of the subject must be duly carried out. The question whether they have been carried out in this case is governed to a great extent by decisions. In *McIntosh* v. *Simpkins* (2) the affidavit was not in accordance with the form given in the County Court Rules, and was therefore insufficient to give jurisdiction. I have stated the result of the case from the head-note, which is fully borne out by the judgments of each of the members of the Court. Thus the Master of the Rolls said that the proceedings founded on the affidavit were wrong ab initio; Collins L.J. said that the plaintiff had not made such an affidavit as was essential to give the judge jurisdiction; and Romer L.J. said that the condition on which the judge could exercise the power given by the rule was wanting. It is not disputed that on the case before us the affidavit was, to say the least of it, as faulty in point of compliance with the prescribed form as that which was the subject of decision in *McIntosh* v. *Simpkins*. (2) The question, therefore, is whether the defendants have waived their objection to the defect in the proceedings. That which it was proposed to exercise in the present case was a jurisdiction to commit to prison. In *Farquharson* v. *Morgan* (1) Davey L.J. pointed out that there are two principles engrained in our law. One is that parties cannot by contract oust the jurisdiction of the Courts; but the learned Lord Justice pointed out how that had been modified. The other principle he declared to be correlative of the first, namely, that "the parties cannot by agreement confer upon any Court or judge a coercive juris-

(1) [1894] 1 Q. B. 552. (2) [1901] 1 Q. B. 487.

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Stirling L.J.

diction which the Court or judge does not by law possess." Waiver is merely a form of agreement or consent to a particular course of action; and if the county court judge had no jurisdiction in the present case, the parties could not confer it upon him by consent. It follows that the committal order was made without jurisdiction, and that the prohibitions asked for should go.

Appeal allowed.

Solicitors for plaintiff: *Bower, Cotton & Bower, for Scott & Allan, Penrith.*

Solicitor for defendants: *Isadore Goldman, for A. V. Hammond, Bradford.*

A. M.

[IN THE COURT OF APPEAL.]

C. A. 1901 *Aug.* 2.

In re COLLYER-BRISTOW & CO.

Solicitor—Bill of Costs—Taxation—Application by Third Party—Arbitration—Costs of Solicitor of Umpire—Order for Payment by Party to Reference—Right to Order for Taxation—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *ss.* 38, 41.

Upon a reference under the Lands Clauses Acts between a company and a landowner relative to the value of land taken compulsorily by the company, the umpire directed that the company should pay the costs of the award, including therein the costs of preparing the award. The company took up the award and paid the amount fixed by the arbitrator for so doing. This amount included a bill of costs of solicitors employed by the umpire to draw up the award. The company applied in the King's Bench Division for an order for taxation of the solicitors' bill of costs under s. 38 of the Solicitors Act, 1843:—

Held, that, the umpire being chargeable with the bill and the company having paid it, the case came within the words of the Act and the bill was taxable, but that the order should be to tax it in the Chancery Division.

APPEAL from an order of a judge at chambers directing the taxation of a bill of costs.

The Lowestoft Water and Gas Company served upon Sir Savile Crossley notice to treat for the purchase of land under the Lands Clauses Act. Each party appointed an arbitrator, and the arbitrators appointed an umpire. The arbitrators

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differed, and the umpire heard the evidence and employed Messrs. Collyer-Bristow & Co., solicitors, to draw up the award. Notice was given to the parties that the award was ready, and it was taken up by the company, who paid 107*l.* 6*s.* 4*d.*, the amount fixed by the arbitrator as payable on taking up the award. The award directed that the company should pay to Sir Savile Crossley the amount awarded to him and his costs of the reference, and that the company should also pay the costs of the award, including the fees of the arbitrators and of the umpire, and in addition the costs and expenses of and incidental to preparing and perfecting the award. The sum paid by the company on taking up the award included in addition to the umpire's fee the amount of the bill of costs of Messrs. Collyer-Bristow & Co. in relation to drawing up the award.

The company took out a summons for the taxation of the bill of costs as between solicitor and client under s. 38 of the Solicitors Act, 1843. The master at chambers made an order to that effect, which was affirmed by Phillimore J., and against this order Messrs. Collyer-Bristow & Co. appealed.

E. M. Pollock, for the solicitors. There is no jurisdiction to order the bill of costs to be taxed under s. 38 of the Solicitors Act, 1843. (1) The Lands Clauses Act, 1895, is applicable to

(1) 6 & 7 Vict. c. 73, s. 38: "Where any person, not the party chargeable with any such bill within the meaning of the provisions hereinbefore contained, shall be liable to pay or shall have paid such bill either to the attorney or solicitor, his executor, administrator, or assignee, or to the party chargeable with such bill as aforesaid, it shall be lawful for such person, his executor, administrator, or assignee, to make such application for a reference for the taxation and settlement of such bill as the party chargeable therewith might himself make, and the same reference and order shall be made thereupon, and the same course pursued in all respects, as if such application was made by the party so chargeable with such bill as aforesaid: Provided always, that in case such application is made when, under the provisions herein contained, a reference is not authorized to be made except under special circumstances, it shall be lawful for the Court or judge to whom such application shall be made to take into consideration any additional special circumstances applicable to the person making such application, although such circumstances might not be applicable to the party so chargeable with the said bill as aforesaid if he was the party making the application."

such a case as this. The company cannot pick out one item of a larger account and ask that it should be taxed separately: *In re Cowdell.* (1) This particular item properly falls within a larger bill which should be taxed under the party and party rule, and would not be liable to the provision as to payment of the costs of taxation by the solicitors if one-sixth is taxed off. A further objection to the taxation is that the money has been paid, and that there are no special circumstances which would bring the case within s. 41 of the Act. In any event the order is wrong, for the taxation if ordered should be in the Chancery Division: *In re Pollard.* (2)

Herbert Smith, for the company, was called on as to the point relating to taxation in the Chancery Division or the King's Bench Division. The King's Bench Division had jurisdiction to make the order to tax, as appears from the judgment of the majority of the Court in *In re Pollard* (3); but it is immaterial to the company in which Division the bill is taxed.

VAUGHAN WILLIAMS L.J. The result of this case is that in the main the appeal fails because, according to our judgment, although the application that the bill of costs should be taxed in the King's Bench Division was irregular, there was jurisdiction in that Court to make the order appealed from, and under this part of the case all we have to do is to make the order indicated as the correct one in *In re Pollard* (2), so as to bring the taxation into the Chancery Division. As regards the question whether the taxation is one that can be dealt with under s. 38 of the Solicitors Act, 1843, I am of opinion that it is. The bill of costs is not the bill of the solicitor to one of the two parties to the reference, but of the umpire's solicitor. It seems to me that it is a bill of costs which ought to be taxed as between solicitor and client, and that the case is within the very words of s. 38. In my judgment, there was a liability on the company to pay those charges of the umpire's solicitor, and although those charges were paid before the order for taxation was asked for, there are ample special

(1) (1883) 52 L. J. (Ch.) 246. (2) (1888) 20 Q. B. D. 656.
(3) 20 Q. B. D. 656, at p. 666.

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circumstances justifying the making of an order to tax, because at the moment when the award was taken up it was impossible to predicate what the effect of the award would be. I think, therefore, the appeal must be dismissed.

STIRLING L.J. I am of the same opinion. Three points were argued—whether there could be a taxation under s. 38 of the Solicitors Act, 1843; whether there were special circumstances justifying the making of the order; and whether, if taxation is ordered, it should be carried out in the Chancery Division or in the King's Bench Division.

The facts that give rise to these questions are that there was an arbitration between the parties with reference to certain lands taken compulsorily by the company. The arbitrators differed and the umpire made his award, the material parts of which for present purposes were that the company should pay to the vendor his costs of the reference, and that the company should pay the costs of the award. The award having been made, notice was given in the usual course, and the award was taken up by the company. In order to take it up the company had to pay the fee demanded by the umpire, including the costs of the umpire's solicitor. Having made this payment, the company made application for the taxation of the bill of costs of the umpire's solicitor under s. 38 of the Solicitors Act, 1843, and the first question is whether that was a proper application. Following the words of the section, we have to inquire who was the party charged. Clearly the umpire was the party charged. Then who is the party who has paid the bill? It has been paid, not by the umpire, but by the company, so that we have the company not chargeable with the bill but having paid it. The case is thus brought within the terms of the section, and the company are entitled to make such application for a reference for the taxation of the bill as the umpire might himself make, and that application must be for taxation of the bill as between solicitor and client.

Great stress was laid on the decision in *In re Cowdell* (1);

(1) 52 L. J. (Ch.) 246.

but that case was different from the present one. There the solicitor whose bill of costs was in question was solicitor to one of the parties to a reference, and had delivered a bill of costs made out as between solicitor and client. The local board, who were the other parties to the reference, applied for taxation under s. 38 of the Solicitors Act, 1843. Fry J. declined, and in my opinion justly declined, to order taxation, on the ground that the bill delivered by the solicitor was a different bill from that for which the local board were liable, which was either a different bill, or a portion only of the larger bill his clients were liable for. Here the application was to tax the costs of the umpire's solicitor and nothing else, and it appears to me that there was ample jurisdiction to make an order under s. 38.

It was next argued that as there had been payment of the bill taxation could only take place if there were special circumstances, either generally under s. 41, or applicable to the person making the application under the latter part of s. 38. The question what are special circumstances has been considered in many cases in which it is needless to enter. The position in this case is, that as between the umpire and solicitor there does not appear to have been any payment by the umpire, and the company made the payment to the umpire at a time when it was not known what the provisions of the award would be. Under this state of things there are special circumstances to justify the making of an order for taxation.

On the last question, whether the taxation should take place in the King's Bench Division or in the Chancery Division, in view of the decision in *In re Pollard* (1), I think it should take place in the Chancery Division. I wish, however, to add that, there being jurisdiction to tax in the King's Bench Division, I by no means say that, if there were a party and party taxation proceeding under the Lands Clauses Acts in that Division, it might not be right for the taxing master to take the whole matter into his consideration. In the present case there is no such taxation going on, and I agree that the

(1) 20 Q. B. D. 656.

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appeal should be dismissed, but that the taxation should be referred to the Chancery Division.

Appeal dismissed.

Solicitors for appellants: *Collyer-Bristow & Co.*

Solicitors for respondents: *Williams & James, for Worship & Rising, Great Yarmouth.*

A. M.

1901 *Aug.* 6, 7.

RATCLIFF & DEALTRY *v.* MENDELSSOHN.

Stock Exchange—Default of Broker—Liquidation—Claim by Jobber—Right of Action against Broker—Contract carried out by Client of Broker—Claim by Jobber against Broker for Difference between Contract and "Hammer" Prices.

A member of the Stock Exchange who has become a defaulter may, notwithstanding that the liquidation is proceeding, be sued in respect of claims which are being dealt with in the liquidation.

A broker, who has become a defaulter on the Stock Exchange, can be sued for the difference between the contract and "hammer" prices in a transaction which has been carried out and settled by his client with the jobber through another broker, inasmuch as by the practice of the Stock Exchange the jobber has to pay to the official assignee the amount of that difference which he receives from the client.

COMMERCIAL CAUSE tried before Mathew J. without a jury.

The plaintiffs were jobbers on the Stock Exchange. The defendant, who had been a broker on the Stock Exchange, was declared a defaulter on May 16, 1901. At the account on May 13 differences amounting to 986*l.* became due to the plaintiffs from the defendant in respect of certain shares. Certain other shares were carried over between the plaintiffs and the defendant to the next account, and the differences against the defendant between the contract price and the "hammer" price in respect of the shares amounted to 281*l.* Claims for these two sums were sent in by the plaintiffs to the official assignee. The official assignee collected assets of the defendant sufficient to pay a dividend of 2*s.* 6*d.* in the pound, and that dividend was paid to the plaintiffs. There were

claims due to the defendant's estate which if collected would be sufficient to pay the claims against his estate in full, but the value of these assets was very doubtful. The transaction in respect of the shares which were carried over on May 13 was carried out and settled at the next account by the defendant's client through other brokers. According to the practice and course of business on the Stock Exchange, as proved at the trial by Dr. Richardson, the official assignee, the plaintiffs had to pay to him for the defendant's estate the sum of 281*l.* which they received from the client, being the difference between the contract price and the "hammer" price.

The plaintiffs brought this action, with the consent of the committee of the Stock Exchange, in order to obtain a judgment upon which proceedings in bankruptcy might be taken.

The defendant contended that he could not be sued until the liquidation was closed, and that, with respect to the claim for 281*l.*, there was no cause of action against him, because the transaction had been carried out and settled by his client.

Rufus Isaacs, *K.C.*, and *Carrington*, for the plaintiffs. It has been expressly decided in *Ex parte Ward* (1), in the Court of Appeal, that a liquidation on the Stock Exchange does not release the defaulter from the claims of creditors who take the benefit of the liquidation; and there is no authority whatever for saying that the pendency of the liquidation operates as a suspension of the legal remedy of a creditor. Rule 54 of the rules of the Stock Exchange contemplates an action being brought against a defaulter. As to the second point, that was disposed of in *Stoneham & Messenger* v. *Wyman* (2), which was exactly the same as the present case. Rule 155 provides for equality among all the creditors, and therefore, according to the practice of the Stock Exchange, the plaintiffs have to pay to the official assignee this sum of 281*l.* which they received from the client, and are out of pocket to that amount.

(1) (1882) 20 Ch. D. 356. (2) (1900) 6 Com. Cas. 174.

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Of course the plaintiffs must give credit for the amount of the dividend which they have received from the official assignee.

Bankes, K.C., and *J. R. Atkin*, for the defendant. If all the assets of the defendant are collected by the official assignee, there will be sufficient to pay the creditors in full. The defendant is deprived of all his assets, and has therefore no means to satisfy any claims himself. The remedy of the creditors is in the liquidation, and until the liquidation is closed they cannot sue the defaulter. The case of *Ex parte Ward* (1) turned entirely upon what the position was after the liquidation was closed. It must be admitted that the defaulter cannot sue for any credit differences due to his estate, and it must be equally impossible for creditors to sue the defaulter for differences due to them.

The transaction, in respect of which the claim for 281*l.* is made, was carried out and settled by the client exactly as if there had not been any default, and therefore the plaintiffs cannot have any claim in respect of that transaction. The plaintiffs have elected to deal directly with the principal, and cannot afterwards make any claim against the broker: *Anderson* v. *Beard*. (2)

Rufus Isaacs, K.C., replied.

[*Ex parte Grant* (3) and *Richardson* v. *Stormont* (4) were also referred to.]

Cur. adv. vult.

Aug. 7. MATHEW J. This is an action by the plaintiffs, who are jobbers on the Stock Exchange, against the defendant, who had been a broker on the Stock Exchange. The claim of the plaintiffs is for two sums of money, the first sum being 986*l.* and the second 281*l.* It appears that at the settlement in the middle of May, 1901, there were several contracts open between the plaintiffs and the defendant. That settlement was on May 13, and on the 16th the defendant was declared a defaulter on the Stock Exchange, and thereupon the usual

(1) 20 Ch. D. 356.
(2) [1900] 2 Q. B. 260.
(3) (1880) 13 Ch. D. 667.
(4) [1900] 1 Q. B. 701.

liquidation proceedings on the Stock Exchange took place; the "hammer" prices were fixed on May 16, and the differences between the contract and "hammer" prices were in that way arrived at. The first sum of 986*l.* became due from the defendant to the plaintiffs in respect of differences upon certain shares at the settlement on May 13; the second sum of 281*l.* was the difference between the "hammer" price and the carrying over price in respect of other shares which had been carried over on May 13.

It is not necessary to describe at length the proceedings in liquidation. The official assignee has to collect the amounts due to the defaulter, and has to ascertain and consider the claims against his estate. The liquidation in this case proceeded to this extent—that amounts were collected by the official assignee which were sufficient to produce a dividend of 2*s.* 6*d.* in the pound for the creditors. The plaintiffs rely upon the contracts made by the defendant, in consequence of whose default this loss has been sustained by them. As to the sum of 986*l.*, it has not been argued, and indeed it could not be argued, that the liquidation operated as a release; that point was settled in *Ex parte Ward.* (1) The contracts survived the liquidation, and it is not contended that what was done under the rules of the Stock Exchange controlled or altered the ordinary law. It seems to me, therefore, that the plaintiffs have a right to recover judgment for that amount. It has been contended that, although the liquidation was not a release, there ought to be a suspension of the legal remedy; that the official assignee collected all the assets, and that it would be hard that judgment should be given against the plaintiff which he could have no means to satisfy, and which must therefore terminate in bankruptcy; and to shew the hardship, it was said that there were various claims of the defendant against clients which when collected might enable the official assignee to pay 20*s.* in the pound. Upon the evidence, that seems to be a far too sanguine estimate. That being so, and there being no authority for saying that there is any suspension of the remedy, and there being certainly no

(1) 20 Ch. D. 356.

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rule of the Stock Exchange providing for anything of the kind, I have come to the conclusion that the plaintiffs are right, and are entitled to enforce their remedy upon the contracts which, as I have said, survived the liquidation proceedings. So much for the first point.

The second point relates to the sum of 281*l.* in respect of differences between the "hammer" price and the contract price of certain shares. The contract entered into by the defendant on behalf of his client was carried over and ran on to the settlement at the end of May. Then, in accordance with the course of business on the Stock Exchange, other brokers were appointed, and the transaction was closed and settled by the client. It is asked what claim the plaintiffs can possibly have, for the contract was carried out just as if there had been no liquidation proceedings. If, however, that argument were to prevail, it is clear that the plaintiffs would be better off than the other creditors, whereas the course of business on the Stock Exchange is to secure, if possible, equality among all the different creditors. To that end rule 155 provides that "a creditor receiving, under any circumstances, a larger proportion of differences on a defaulter's estate than that to which each of the creditors is entitled, shall refund such portion as shall reduce his dividend to an equality with the others." Evidence was given before me by the official assignee, Dr. Richardson, as to the course of business under that rule, and the rule seems clear enough. It was proved that it is the invariable course of business in such cases to require that the person who receives more than the other creditors shall bring the amount so received by him into the general account of the defaulter's estate. In other words, that means that the plaintiffs were bound to account for this sum of 281*l.* to the official assignee. In that way they contribute that amount to the assets of the defaulter, out of which dividends are provided for all the creditors. What is the result? The plaintiffs had to pay in that way, and so were to that amount out of pocket. The contract survived the liquidation, and on that contract the defendant remained liable to indemnify the plaintiffs in respect of the amount which they handed over to the official assignee. The plaintiffs are entitled

to recover the amount of their claim, less the dividends receivable from the official assignee.

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Judgment for the plaintiffs for an amount agreed by counsel.

Solicitors for plaintiffs: *Michael Abrahams, Sons & Co.*
Solicitors for defendant: *Osborn & Osborn.*

P. B. H.

NIGEL GOLD MINING COMPANY, LIMITED *v.* HOADE.

1901
July 22, 26.

Insurance—Insurance of Products of Mine in Foreign Country—Declaration of War—Seizure by Enemy's Government of Things Insured—Validity of Insurance—Public Policy.

The plaintiffs were registered as a joint stock company in Natal, their only property being a gold mine owned and worked by them in the Transvaal. Before October, 1899, when war was declared between the Transvaal Republic and this country, the plaintiffs had effected with the defendant, a British subject, a policy of insurance of certain gold products of their mine, the perils insured against including "enemies," and "arrests, restraints, and detainments of kings, princes, and people." A few days after war was declared the agents of the Transvaal Government seized and carried away some of the gold products insured. The plaintiffs had shut down their mine when war was declared, and there was nothing to shew that they intended to continue their business or mining operations in the Transvaal afterwards. In an action on the policy to recover in respect of the gold products so seized:—

Held, that there was no ground of public policy which prevented the policy of insurance from continuing in force after war was declared, and therefore that the plaintiffs were entitled to recover.

COMMERCIAL CAUSE, tried before Mathew J.

The action was brought to recover moneys alleged to be due under a policy of insurance, dated May 17, 1899, of certain property at the plaintiff company's gold mine situate in the Transvaal Republic.

The following statement of the facts proved or admitted at the trial, and the inferences drawn therefrom by the learned judge, is taken from his written judgment. (1)

(1) Post, p. 853.

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This was an action on a policy of insurance effected by the plaintiff company with the defendant, an underwriter at Lloyd's. The subject-matter of the insurance is described in the policy as "amalgam, precipitates from cyanide and chlorination processes, lead bullion, and gold bars." So small was the apprehension when the policy was effected that peaceful relations with the South African Republic would be disturbed that the premium was only 6*d.* per cent. The policy provided for the commencement of the risk with reference to the different subjects insured, and protected the property while on the premises at the plaintiffs' mine in the Transvaal and until despatched therefrom. In the ordinary course a second policy would have protected the gold while being carried to England. The risk on the amalgam commenced when taken from the plates and entered in the amalgam register. The policy contained in print the usual capture clause (1), and there was added in writing the following clause: "This insurance covers and includes risk of theft, larceny, burglary, and all and every risk, whether loss arise from want of integrity of assured's employees or otherwise. To pay average irrespective of percentage. This instrument is not to be deemed a sea insurance policy." The last words appear to be a provision with reference to possible stamp objections. The plaintiff company were the owners of a gold mine in the Transvaal, and on October 17, 1899, after the commencement of the war, the agents of the Transvaal Government seized and carried away from the mine 780 ozs. of amalgam, and in February, 1900, there was a further seizure by agents of the Government of 106 ozs. of amalgam. This latter quantity had not been entered in the amalgam register until some days after the seizure. In the year 1888 the plaintiff company had been registered in Natal as a joint stock company. Subsequently, the company had received a supplemental incorporation in the Transvaal. The object of this proceeding was to enable the company to sue and be sued in the Transvaal in its corporate name, and to

(1) The perils insured against were the ordinary ones enumerated in a Lloyd's policy, including "fire . . . . enemies . . . . thieves . . . . arrests, restraints, and detainments of all kings, princes, and people."

obviate the difficulty under Transvaal law of representing a foreign company under power of attorney. I am satisfied from the evidence given in the case that this additional incorporation was supplemental and ancillary only, and did not alter the status of the Natal company. A branch office had been opened at Johannesburg, but it was only used for transfer of shares, and transacted no other business. The only property of the company was the gold mine in the Transvaal. There was a resident manager and secretary, and the working of the mine was controlled by a committee of directors, who went up from Natal for the purpose every month.

Joseph Walton, K.C., and *Lord Robert Cecil, K.C.* (*Loehnis* with them), for the defendant. The defendant is not liable on the facts proved by the plaintiffs. The loss is not covered by the policy. The only risks insured against are those described in the written clause of the policy, which supersedes the printed clause, and those risks do not include capture by the King's enemies. At any rate, the policy does not cover the seizure in February, 1900, because the amalgam, when the seizure took place, had not been taken from the plates and entered in the amalgam register.

Next, when war was declared the policy ceased to be effective, because the subject-matter of the insurance must be deemed to have then been enemies' property. The insurance cannot be enforced, because it would be allowing a subject of this country to lend his assistance to protect by insurance the property and commerce of the subjects of a country with which hostilities are being carried on, and a proviso that the insurance should not extend to any loss happening during the existence of hostilities must be read into the policy: *Brandon* v. *Curling* (1), judgment of Lord Ellenborough. (2) The plaintiff's property, and the produce of it, was Transvaal property, being part of the natural resources of that country. It was, therefore, stamped with a hostile character; and if shipped even before the war broke out would have been liable to seizure at sea as lawful prize. A British subject who is in a hostile

(1) (1803) 4 East, 410; 7 R. R. 592. (2) 4 East, at p. 417.

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country when war is declared is, in respect of his personal property there, clothed with a hostile domicil unless he does his best to get out of the country. The principle is stated in various authorities, both English and American, and by writers on International Law: *The Phœnix* (1); *The Vrow Anna Catharina* (2); *Society for the Propagation of the Gospel* v. *Wheeler* (3); *The San Jose Indiano* (4); *The Venus* (5); *Bentzon* v. *Boyle* (6); Twiss, Law of Nations in Time of War, 2nd ed. p. 306; Upton on Marine Warfare and Prize Law, pp. 149, 150; Dicey on the Conflict of Laws, p. 135. The plaintiffs, being incorporated in the Transvaal, were, quâ their property in that country, Transvaal subjects when the war broke out; it makes no difference that they were also incorporated in Natal.

Scrutton, *K.C.*, and *Balloch*, for the plaintiffs, in reply. The printed part of the policy, which enumerates the perils insured against, is not superseded by the written part, though it may be conceded that some words which apply only to ships must be discarded. There is no ground of public policy to prevent the plaintiffs from recovering. They are not alien enemies, nor have they lent assistance to the King's enemies. All the cases cited are of old date, and the rule with respect to public policy which is stated in some of them would not be followed at the present day: see the judgment of Lord Watson in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (7); *Printing and Numerical Registering Co.* v. *Sampson* (8), per Jessel M.R., and the judgments of A. L. Smith M.R. and Romer L.J. in *Driefontein Consolidated Gold Mines, Limited* v. *Janson*. (9) This is not a case in which enemies' goods were insured against British capture, or in which the property of a neutral found in an enemies' country has been seized. The facts, therefore, do not bring it within the authorities relied on for the defendant. The mere fact of the incorporation of the plaintiff company in the Transvaal, for convenience in enabling

(1) (1803) 5 C. Rob. 20.
(2) (1804) 5 C. Rob. 161.
(3) (1814) 2 Gall. 105.
(4) (1814) 2 Gall. 268.
(5) (1814) 8 Cranch, 253.
(6) (1815) 9 Cranch, 191.
(7) [1894] A. C. 535, at p. 553.
(8) (1875) L. R. 19 Eq. 462, at p. 465.
(9) [1901] 2 K. B. 419.

the company to sue and be sued there, does not make them Transvaal subjects.

Cur. adv. vult.

July 26. MATHEW J., after stating the facts set forth ante, proceeded:—The first point made for the defendant was that the loss was not covered by the policy. It was said that the written clause superseded what was in print, and that the only losses covered were those described in writing. This does not seem to me the true construction of the policy. The printed matter is not repugnant to, or inconsistent with, what is written; both clauses describe the risks intended to be insured. As to the second seizure, the defendant contended that the policy had not attached by reason of the failure to register the amalgam. The condition of registration was an important protection to the underwriter, and its omission, in my judgment, prevents the loss from being recoverable.

The main contention of the defendant's counsel was that the subject-matter of insurance was enemies' property, and that after a declaration of war the policy had become ineffective. It was pointed out that the company had been carrying on their business within the territories of the South African Republic, and had acquired a commercial domicil in the Transvaal, and that the products of their mine were Transvaal and not British property, and it was urged that, from the time when war was declared, the property was stamped with a hostile character, and on the high seas would be subject to capture and condemnation as lawful prize. In support of this contention recourse was had to the authority of cases decided in the English and American Prize Courts in the early part of the last century. There can be little doubt that these cases would not be followed now, and even when those decisions were pronounced their authority was rejected by eminent lawyers: see *The Venus*. (1) The sounder opinion would seem to be that the subject of one country, surprised by a declaration of war in the country where he has a commercial domicil, ought to have time allowed him to free himself from his

(1) 8 Cranch, 253, at p. 279.

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commercial engagements and effect a removal of his property. The conflicting opinions upon this subject are discussed with great ability in Duer on Marine Insurance, vol. i., lecture 5. In this case there was no indication of any intention on the part of the Natal company to continue their business in the Transvaal after war had been declared. There was no evidence of any intention on the part of the company to continue their mining operations while the war continued. No authority was cited to shew that the supposed rule relied upon by the defendant had ever been recognised by or adopted in insurance law. I am satisfied that for the purposes of this case the gold products in question are not to be regarded at the time of the seizure as enemies' property merely by reason of the commercial domicil of the company when war was declared.

But the same result was sought to be reached in a different way. It was said that the plaintiff company had a two-fold character. It was a British company and a Transvaal company; it was amphibious, and was at once friendly and hostile. It was urged that the goods should be deemed to be Transvaal goods, and that the company should be deemed to be a Transvaal company, and that to indemnify the plaintiffs should be deemed to be an addition to the resources of the Transvaal Government, and, therefore, to be against public policy. But this argument seems to me to offer a series of fictions in lieu of the plain facts. I am of opinion that the gold products in question were British goods, and were seized by a hostile force, and that the loss is covered by the policy. My judgment is, therefore, for the plaintiff company.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Loughborough, Gedge, Nisbet & Drew.*

Solicitors for defendant: *Waltons, Johnson, Bubb & Whatton.*

W. A.

[IN THE COURT OF APPEAL.]

C. A.
1901
July 17.

BROWN *v.* HOUSTON.

Practice—Costs—Action for Libel—Pleas of Justification and Privilege—Defendant successful on one and unsuccessful on the other—Costs of Witnesses relating exclusively to Plea on which Defendant unsuccessful.

Where in an action for libel pleas of justification and privilege are set up, and the defendant fails to establish the plea of justification, and judgment is given for him on the plea of privilege, the plaintiff is not entitled to the costs of witnesses whose evidence does not relate exclusively to the plea of justification.

APPEAL from the order of Bucknill J. at chambers refusing an application to review a taxation of costs.

An action was brought for libel and slander by the plaintiff against the defendant, and was tried before Bucknill J. and a special jury at Liverpool.

The statements complained of were that certain hay shipped by the plaintiff for use of the forces in South Africa was rotten and liable to spontaneous combustion. The defendant pleaded justification, and also that the allegations were made on a privileged occasion. The jury found against the defendant on the issue of justification, but they found that the defendant had made the allegations without malice; and as the learned judge ruled that in law the occasion was privileged, judgment was entered for the defendant with costs. The judge subsequently directed that the plaintiff should have such costs as related exclusively to the plea of justification. On taxation the Liverpool district registrar disallowed the plaintiff the costs of all his witnesses on the ground that their evidence did not relate exclusively to the plea of justification.

Bucknill J. refused an application to review this taxation, and the plaintiff appealed.

Tobin (*Pickford*, *K.C.*, with him), for the appellant. The district registrar was wrong. The issue of justification being

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found in favour of the plaintiff, the plaintiff was entitled to the costs of that issue. No doubt each case must depend on its own circumstances, but the registrar ought to have decided in detail what costs were exclusively due to the plea of justification, and given them to the plaintiff: *Empson* v. *Fairfax* (1); *Reynolds* v. *Harris*. (2)

Harrison v. *Bush* (3) is distinguishable, as there it was clear that the evidence given on the issue of justification was also material on the plea of not guilty.

Rufus Isaacs, K.C. (*Horridge, K.C.*, with him), for the respondent. *Harrison* v. *Bush* (3) is absolutely in point. The rule there laid down has always been acted upon, and the Court will not now disturb it. The registrar was of opinion that all the evidence called on the issue of justification was also relevant on the issue of malice.

Tobin replied.

A. L. SMITH M.R. This is a case arising out of a taxation of costs. The action was brought for libel and slander by a hay merchant against a member of Parliament. The allegations complained of were that certain hay which was being sent by the plaintiff to South Africa for the use of the troops engaged there was bad, and likely to be liable to spontaneous combustion on board the vessel on which it was being sent out. Such statements naturally gave rise to a good deal of excitement and created a good deal of bad feeling. The action was ultimately tried before my brother Bucknill and a special jury at the Liverpool Assizes. Two defences were set up by the defendant. He first pleaded justification—that is to say, he set up the plea that the allegations were true—that the hay was really bad hay and was liable to spontaneous combustion; and, secondly, he pleaded privilege—that is to say, he said that the occasion on which he had uttered or written the words in question was a privileged occasion, and that the action, therefore, would not lie against him. The case was tried on those two issues, and the jury found that the hay was

(1) (1838) 8 Ad. & E. 296. (2) (1858) 28 L. J. (C.P.) 26.
(3) (1855) 5 E. & B. 344.

not such as was described by the defendant—in other words, he was defeated on his plea of justification; but they also found that there was no express malice on his part in making the allegations; and the judge having ruled that the occasion was privileged, and the jury having found that he was not actuated by any such motives as would take the matter out of the privilege, the issue of privilege was decided in the defendant's favour, and judgment was given accordingly. Then came the question of costs. On the taxation the plaintiff carried in a bill of costs, in which he included the expenses of witnesses who were called for the purpose of defeating the defendant's plea of justification and the charges thus made against the plaintiff by the defendant. He asked that, as he had been successful in defeating the defendant on this issue, the defendant should pay the costs of these witnesses. To this the defendant's answer was that these witnesses were not exclusively for the purpose of that issue, but that their evidence was also material to the question whether or not the defendant was actuated by express malice in making the allegations. It seems to me, speaking for myself, that as soon as it is shewn that a witness is called by an unsuccessful party to an action to give evidence on two issues, one of which is won and the other lost, the party cannot get the costs of that witness. I think that I am accurate in saying that the costs of such a witness have never been allowed. In *Harrison* v. *Bush* (1) one of the strongest Courts of modern times gave a decision which is absolutely on all fours with the present case, and which covers the case, and I must say that I have not the temerity to differ from the decision of such a Court. No doubt in some cases this rule may work some hardship; but the present rules of taxation often have that effect, and I see no reason for departing from the well-established rule.

VAUGHAN WILLIAMS L.J. I agree that we ought not to alter a rule existing since 1855 without strong reason for so doing—stronger than I can find in the present case. One ground for thinking that we ought not to overrule this rule of

(1) 5 E. & B. 344.

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Vaughan Williams L.J.

taxation is that I think now that any injustice can be obviated by a special order made by the judge at the conclusion of the trial. I am glad to think that this is so. I am afraid that the observations which I have to make may seem to my Lord pervaded by temerity because they do not entirely accept the reasoning of Lord Campbell C.J. in *Harrison* v. *Bush* (1), and because they lead to the conclusion that the rule laid down in that case tends to work injustice. To state the rule properly, I use the words of Cockburn C.J. in delivering the judgment of the Court in *Reynolds* v. *Harris* (2), where he says (3): "We should be sorry to admit it possible that there is any imperative rule of law or inveterate practice by which we are compelled to order that the expense of unsuccessfully attempting to prove falsehoods, which we know by the information of the judge to have been found false by the jury, must nevertheless be paid for by the party who so far had truth on his side." Now, can any one doubt that, whatever artificial issues lawyers may cut up this case into, one of the issues was—Aye or No? Was this hay good or bad? The jury have found that it was good. "But," says the defendant, "although my allegation that the hay was bad has been proved to be untrue, that does not matter, because, under the old rule laid down in *Harrison* v. *Bush* (1), the only question is whether the evidence called on the plea of justification is also admissible on a plea of not guilty." The defendant says, and rightly, that although he tried to prove a falsehood and failed to do so, yet he is entitled to have the costs of bringing witnesses to prove that falsehood, because their evidence was also admissible on the question whether or not he was actuated by malice in making the allegations. It is quite clear, taking the verdict of the jury as a whole, that they did find that, notwithstanding the cogent fact that in their opinion the incriminated hay was good hay, there was no sufficient proof that the defendant was actuated in making the allegations by any oblique motive such as personal advantage, and they, therefore, found for him on the issue of express malice. The result, therefore, of the rule in *Harrison* v.

(1) 5 E. & B. 344.

(2) 28 L. J. (C.P.) 26.

(3) 28 L. J. (C.P.) at p. 33.

Bush (1) is that where a man has gone down to trial to prove untrue allegations to be true, he is to receive the costs of the witnesses whom he adduced to prove that falsehood. Nevertheless, as I have said, I think that we ought not to alter a rule of such a standing, more especially since it is one of such a kind that the order of the judge at Nisi Prius who tries the action can remedy any injustice to which it may give rise.

It is quite true that in *Harrison* v. *Bush* (1) the judges say that the general question of the truth or falsehood of the alleged defamatory words is material on the issue of express malice. I say that that is not so. It may be or it may not be. It depends on the circumstances of the case. No doubt in *Harrison* v. *Bush* (1) the judgment was based on the fact that the occurrences were of such a nature that the defendant must have known whether his allegations concerning them were true or false. It seems to me that it is not right to say that the truth or falsehood of the allegation is material on the question of express malice. What is material is the knowledge of the defendant of its truth or falsehood—the state of his mind in regard to the allegations.

STIRLING L.J. In this case we have to determine a question of taxation on the result of a trial. The judge did not make any formal order as to costs, but he gave directions on which both parties acted. The defendant was to have the general costs of the action, but so far as those costs were increased by the plea of justification he was not to have them, and the plaintiff was to have all costs relating exclusively to that plea. In compliance with these directions the plaintiff carried in for taxation a bill containing the expenses of witnesses who were primâ facie called exclusively on the issue of justification. The libel was as to the quality of certain hay. The defence of the defendant was that he had seen the hay and that it was bad hay. It was practically admitted that the occasion was privileged, and in order to take the case out of the privilege it became necessary to shew express malice on the part of the defendant. One way of doing this was to prove that the hay

(1) 5 E. & B. 344.

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was good and that the defendant knew that it was so, and thus to shew that the defendant, who had seen the hay, could not honestly have arrived at the conclusion that it was bad.

The defendant says that the witnesses who were called on the issue of justification did not give evidence exclusively as to that plea, but that they also gave evidence available on the question whether there was or was not express malice. The taxing master has given effect to that contention, and, in the circumstances which I have stated, I think that he has done so rightly. It would, perhaps, have been better if the matter had been dealt with by the judge at the trial. I agree that the rule laid down in *Harrison* v. *Bush* (1) might lead to considerable injustice; but, as Vaughan Williams L.J. has pointed out, that can be obviated by an order of the judge who has tried the case, and has the whole matter in his cognizance. I think, therefore, that the decisions of the district registrar and of Bucknill J. were right, and that the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Harold Holmes, for Rees and Hindley, Liverpool.*

Solicitors for respondent: *Edwards & Cohen, for Simpson, North, Harley & Birkett, Liverpool.*

(1) 5 E. & B. 344.

A. P. P. K.

STEAMSHIP CARISBROOK COMPANY *v.* LONDON AND PROVINCIAL MARINE AND GENERAL INSURANCE COMPANY.

1901
Aug. 6, 7.

General Average—Sacrifice made on Outward Voyage of Ship in Ballast—Liability of Chartered Freight to contribute.

A ship was chartered to proceed to a foreign port, there load a cargo and bring it home, the chartered freight being payable on delivery of the cargo. Whilst the ship was proceeding in ballast to her port of loading she grounded, and a general average sacrifice was made. She subsequently continued her voyage, loaded her cargo, delivered it, and received the freight:—

Held, that the chartered freight was liable to contribute to the general average sacrifice.

Williams v. *London Assurance Co.*, (1813) 1 M. & S. 318; 14 R. R. 441, followed.

TRIAL before Mathew J. without a jury.

By a policy of insurance, dated February 7, 1900, and underwritten by the defendants, the plaintiffs were insured for the sum of 2000*l.* upon the hull and materials, engines and machinery of the steamship *Nestor* from February 1, 1900, to January 31, 1901. By a charterparty dated September 11, 1900, the plaintiffs chartered the *Nestor*, which was therein described as "reported expected to leave Fleetwood about 12th September in ballast, calling at a Bristol Channel port for coals," to Messrs Strachan & Co. of Savannah. It was thereby provided that the ship should proceed to Savannah, and there, having discharged her cargo, if any, load a cargo of cotton, and proceed therewith to Liverpool, Manchester, or Bremen as directed; the freight to be paid on unloading and right delivery of the cargo. The vessel sailed on September 13 from Fleetwood, in ballast for Savannah, and she arrived on the night of October 3 in Savannah Roads. On the following day she was proceeding up the river when she grounded, and in the efforts made to get her off she sustained damage. She was eventually got off and the damage repaired, and she proceeded to her loading berth, loaded her cargo, brought it home, and

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received the chartered freight. An average statement of the repairs to the ship was prepared, but the average adjusters in preparing it omitted to make the chartered freight contribute. The plaintiffs having sued the defendants on the policy for the cost of the repairs, the defendants contended that the average statement was incorrect, and that upon a proper adjustment of the loss the plaintiffs were liable to make contribution in respect of the freight under the charterparty.

Carver, *K.C.*, and *D. Stephens*, for the plaintiffs. Where a general average sacrifice is made in the course of the outward voyage of a ship proceeding in ballast to her port of loading, the freight of the homeward voyage is not liable to contribute. The case of *Williams* v. *London Assurance Co.* (1), upon which the defendants will rely, is distinguishable. There the ship was chartered from London to the East Indies, there to deliver her outward cargo and return thence with a cargo for England, and the payment of freight for the entire voyage out and home was made conditional upon her arriving home safely. A general average loss having been incurred on the outward voyage, it was held that the whole freight, for the homeward as well as for the outward voyage, being one entire and indivisible sum, was liable to contribute in general average. That case turned upon the special conditions of the charterparty, which treated the outward and homeward voyages as one entire voyage, so that the homeward freight was being earned in the course of the outward voyage. Here that was not the case. The charter is from Savannah to London only, and the ship did not begin to earn the freight until she reached Savannah, so that the chartered freight was not at risk at the time of the loss incurred. But if *Williams* v. *London Assurance Co.* (1) be indistinguishable, it should not be followed. That case has been adversely criticised by various writers on marine insurance. Thus Benecke, Pr. of Indem. at p. 315, states it as his opinion that in such cases "the freight ought to be divided, notwithstanding the stipulation in the charterparty, and that such part only ought to contribute as may fairly be presumed to

(1) 1 M. & S. 318; 14 R. R. 441.

belong to the outward voyage"; and he points out that "Had the vessel in the above case incurred another general average upon her voyage home, the whole freight for the voyage out and home would according to the same principle have been liable to contribute to this also, whilst the outward-bound cargo only would have contributed to the first, and the homeward bound cargo only to the second, general average." Arnould, 2nd ed. pp. 955, 956, after referring to Benecke's dissent from the decision, adds that "it may perhaps be doubted whether the case of *Williams* v. *London Assurance Co.* (1) can, on principle, be supported." And Phillips, 3rd ed. s. 1387, adopts the view that in such a case as that of *Williams* v. *London Assurance Co.* (1), or that of a ship going out in ballast to bring back a homeward cargo, the fairer plan is to assess to general average, not the whole aggregate freight for the round voyage, but only "the freight to the next port of delivery or loading to which the vessel arrives, whether any freight is to be actually due there or not." And in *Potter* v. *Rankin* (2) Willes J., in delivering the judgment of the Court, used language which suggested that where a ship is chartered to go to a foreign port and there load a cargo and bring it home, the outward voyage is no part of "the adventure in which the freight is to be earned."

Joseph Walton, K.C., and *F. D. Mackinnon*, for the defendants. The language of Willes J. in *Potter* v. *Rankin* (2) was obiter. In the 2nd edition of Bailey on General Average, pp. 152, 153, it is said that, "When a vessel is chartered to go to a distant port to fetch a cargo and bring it home, ... on her outward passage she is performing her homeward contract, and on the outward passage is therefore earning the homeward freight. That homeward freight should, therefore, contribute to any general average caused by a general average act on the outward passage." In Lowndes on Average, 4th ed. pp. 310–12, *Williams* v. *London Assurance Co.* (1) is treated as established law. And in *Moran* v. *Jones* (3), which was a similar case, Lord Campbell held it to be indisputable that the

(1) 1 M. & S. 318; 14 R. R. 441. (2) (1868) L. R. 3 C. P. 562, at p. 567.
(3) (1857) 7 E. & B. 523.

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homeward freight was in peril on the outward voyage and must contribute in general average. In the American case of *The Brig Mary* (1) Sprague J. followed the decision in *Williams* v. *London Assurance Co.* (2), and rejected the criticisms of Benecke and Phillips on that case.

Where a ship is chartered to proceed in ballast to a foreign port to fetch a cargo home, the chartered voyage begins as soon as she starts for the foreign port; the freight is earned by the whole voyage, and not merely by bringing the cargo home from the port of loading: per Cockburn C.J., *Barber* v. *Fleming*. (3)

Carver, K.C., in reply. In *Moran* v. *Jones* (4) the liability of the homeward freight to contribute to the expense of the outward sacrifice was no part of the decision, its liability being conceded in that case by counsel.

MATHEW J. The question in this case is whether homeward freight under a charter ought to contribute to a general average sacrifice made on the outward voyage, and I am of opinion that under the circumstances it ought. The ship was chartered to go out to Savannah and bring home a cargo of cotton, and the chartered freight was to be payable on delivery of the cargo at the port or ports of destination. She had by the terms of the charter the option of taking a cargo of coals out to Savannah; but, as a matter of fact, she went out in ballast, and it was probably contemplated at the time the charter was entered into that that was what she would do. In the course of her outward voyage she stranded, and a general average sacrifice was made, to which it was contended by the defendants that the homeward freight must contribute. Now, there cannot be any question to my mind that this vessel on the outward voyage was earning the homeward freight. The charter obliged her to go to Savannah and to bring the cargo home, and she was discharging that obligation when the disaster occurred. Therefore it occurred in the course of the voyage contemplated by

(1) (1842) 1 Sprague's Decisions in Admiralty, 17.

(2) 1 M. & S. 318; 14 R. R. 441.

(3) (1869) L. R. 5 Q. B. 59, at p. 67.

(4) 7 E. & B. 523.

the charter. In consequence of the sacrifice the vessel reached Savannah, took her cargo on board and brought it home, and became entitled to the freight. In that state of things it would on principle and reason appear right that the homeward freight should contribute, because everything pointed to that as the object with which the sacrifice was made. There was no other interest except to secure that the ship arrived at her port of loading, took her cargo on board, delivered it, and received the freight in consideration of the services rendered by her in going out and bringing the cargo home. That view is supported by the case of *Williams* v. *London Assurance Co.* (1) In that case there was a charter for a round voyage out and home, and the chartered freight was to be payable upon delivery of the cargo at the homeward port; and there, as here, a general average sacrifice was made in the course of the outward voyage. The Court held that the homeward freight ought to contribute to that sacrifice. The principle of that decision is directly applicable to the present case. But that decision has been the subject of adverse comments by writers on marine insurance. Thus Benecke, at p. 315, in discussing that case expressed the opinion that in such a case the freight ought to be divided, that a portion should be allocated to the outward voyage and a portion to the homeward voyage, and that the contribution should be in respect only of the portion presumably being earned on the outward voyage: a principle which, in my opinion, it would be highly inconvenient to adopt. Arnould, again, following Benecke, suggests a difficulty about the case of *Williams* v. *London Assurance Co.* (1); and Phillips goes further than either, and advances a theory of his own as to how such cases should be dealt with. It is noticeable that, notwithstanding the high authority of Phillips, the American Court in *The Brig Mary* (2) followed *Williams* v. *London Assurance Co.* (1) Then Mr. Carver further relied on a passage in the judgment of Willes J. in *Potter* v. *Rankin.* (3) But I do not suppose for one moment that the judge there intended by anything he said to differ from *Williams* v. *London*

(1) 1 M. & S. 318; 14 R. R. 441. (2) 1 Sprague's Decisions in Admiralty, 17.
(3) L. R. 3 C. P. 562, at p. 567.

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Assurance Co. (1), and the statement that he made with reference to the law on that occasion had no direct bearing on the question in controversy in that case. The present point had not been raised nor discussed, and I am of opinion that the decision of *Williams* v. *London Assurance Co.* (1) remains unaffected by anything that was there said. On the other side Mr. Walton cited the authority of Bailey and of Lowndes. Those authorities ought not to weigh much in balancing decisions on the one hand against their comments on the other. He, however, also cited an important case of *Moran* v. *Jones* (2), where it was recognised that the right way of dealing with a case of this kind was to make the chartered freight contribute to general average, although at the time of the sacrifice the goods were not in peril. That appears to be a recognition of *Williams* v. *London Assurance Co.* (1), and a strong authority in favour of the defendants. I am of opinion that in this case the homeward freight ought to contribute, and my judgment must be for the defendants.

Judgment for the defendants.

Solicitors for plaintiffs: *Holman, Birdwood & Co.*

Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

(1) 1 M. & S. 318; 14 R. R. 441. (2) 7 E. & B. 523.

J. F. C.

MICHAEL *v.* HART & CO.

1901
Aug. 7.

Damages—Measure of—Stockbroker—Wrongful Sale of Shares.

The defendants, a firm of stockbrokers, in pursuance of a contract in that behalf bought shares on the Stock Exchange on behalf of a principal, and contracted that they would at any time before the settling day, if so directed, sell the same upon the principal's behalf. Before the settling day arrived the defendants in breach of their contract sold the shares without the principal's consent:—

Held, that in an account taken between the defendants and the principal the latter was entitled to be credited, in respect of the shares so wrongfully sold, with the highest prices that the same might have realized in the market at any time between the date of the sale and the settling day.

FURTHER CONSIDERATION before Wills J.

In April, 1901, the plaintiff opened an account with the defendants, who are stockbrokers, and employed them to buy and sell stocks and shares for him, and he deposited with them certain shares to secure any balance that might from time to time become due to them from the plaintiff in respect of the said transactions. In pursuance of the said employment the defendants bought and sold for the plaintiff various parcels of stocks and shares. On May 11 it was agreed between the plaintiff and the defendants that certain contracts for the purchase of various stocks, which had been made by the defendants on the plaintiff's account for the Stock Exchange settlement in the middle of May, should be carried over to the following settlement which would take place on May 28 and 29. In breach of the said agreement the defendants on May 16 wrongfully closed their account with the plaintiff and sold out against him the various stocks which they had bought for him, and they claimed to realize the deposited shares in order to satisfy the amount which upon the balance of the account they alleged to be due to them from the plaintiff. The plaintiff sued the defendants for the breach of their contract, and claimed to have an account taken between them upon the footing of his being credited with the highest prices which the said stocks

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and shares could have realized at any time during the currency of the account terminating on May 28 and 29; he also claimed to have the deposited shares delivered up to him.

Isaacs, *K.C.*, and *A. J. David*, for the plaintiff. The plaintiff is entitled in account with the defendants to the profit which would have been gained by a sale of the several stocks and shares at the highest price obtainable in the market which they respectively would have fetched at any date during the fortnight in question. In *Murray* v. *Hewitt* (1), where a stockbroker wrongfully closed his client's account and sold his stocks without authority, it was held by Bowen L.J., on the question as to the measure of damages, that the plaintiff was entitled to the difference between the sum realized by the wrongful sale for which he had been given credit, and the value of the stocks at the time of action brought. So in an action for not replacing stock at the stipulated date the measure of damages has been held, in cases in which the market was rising, to be the price of the stock at the date of the trial, that presumably being the highest price since the date of the breach of contract: *Shepherd* v. *Johnson* (2); *Harrison* v. *Harrison*. (3) In the latter case Best C.J. said: "Justice is not done if you do not place the plaintiff in the same situation in which he would have been if the stock had been replaced at the stipulated time. We cannot act on the possibility of the plaintiff's not keeping it there. All we can say is—you have effectually prevented him from doing so." It may be that the plaintiff, if the contract had not been broken, would not in point of fact have instructed the defendants to sell each parcel of stock just when the market was at its highest point; but that is not a matter which the Court can take into consideration.

Lawson Walton, *K.C.*, *Reed*, *K.C.*, and *Kisch*, for the defendants. The damages must be assessed either at the date of the breach—that is, on May 16, when the defendants closed the account, or on May 29, at which date the account would have

(1) (1886) 2 Times L. R. 872. (2) (1802) 2 East, 211.
(3) (1824) 1 C. & P. 412.

closed in the ordinary course. But the plaintiff cannot select any of the intermediate dates which are most unfavourable to the brokers, on the fictitious assumption that he would have given instructions to the brokers to close each separate parcel of stock at the time when it was at the highest price. In *Murray* v. *Hewitt* (1) Bowen L.J. says nothing about the plaintiff being entitled to the highest price in the interval; for all that appears to the contrary the date of the writ in that case may also have been the date of the wrongful act complained of.

Isaacs, K.C., in reply.

WILLS J. The only matter that I have to deal with in this case is the measure of damages. The plaintiff had entered into a contract with the defendants, whereby the defendants were to purchase shares on his behalf. The defendants in pursuance of that contract had purchased various shares on the plaintiff's behalf, and the plaintiff was entitled to have those shares delivered to him on the settling day on payment of certain prices. The defendants further by their contract undertook that they would at any time before the settling day, if directed to do so by the plaintiff, sell the same shares for the plaintiff. This they did not do, but repudiated their contract, and put an end to it. Under those circumstances it seems to me that the plaintiff is entitled to all the advantages that would have been his or that might have been his if the contract had been carried out. Amongst those advantages was the right to sell the shares whenever he chose during the period over which the transactions were to run, and at different times different prices might have been realized. No doubt the plaintiff would in fact never have realized the best prices that ruled during that period. But I think I am right in saying that the Courts have never allowed the improbability of the plaintiff's obtaining the highest prices to be taken into consideration for the purpose of reducing the damages. The defendants are wrong-doers, and every presumption is to be made against them. In my opinion the plaintiff is entitled to the highest prices which

(1) 2 Times L. R. 872.

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were obtainable during the period during which he had the option of selling.

Judgment for the plaintiff.

Solicitors for plaintiff: *Martin & Co.*
Solicitors for defendants: *Beyfus & Beyfus.*

J. F. C.

1901
Aug. 5, 10.

CORPORATION OF TRURO *v.* ROWE.

Fishery—Oysters—Laying Oysters on Foreshore to get rid of Impurities—Incident of Public Right of Fishing—Municipal Corporation—Power to acquire Lease of Foreshore—Sea Fisheries Act, 1868 (31 *&* 32 *Vict. c.* 45), *s.* 41.

The oysters in a certain oyster fishery were when freshly dredged unfit for consumption by reason of their being contaminated with certain impurities in the water in which the oyster beds were situate, and the fishermen in order to render the oysters marketable had been used from time immemorial to deposit them for a time after dredging upon the foreshore in another part of the fishery where the water was pure:—

Held, that this practice might be justified as against the owners of the soil of the foreshore as being incidental to the enjoyment of the public right of oyster fishing both by custom and by the common law.

Where a municipal corporation has obtained an order from the Board of Trade conferring a right of regulating an oyster fishery under the Sea Fisheries Act, 1868, it may by virtue of s. 41 of that Act lawfully take a lease of the foreshore of the fishery if the acquisition of the leasehold will enable it the better to carry out the purposes of the order.

FURTHER CONSIDERATION before Wills J. after trial before a jury.

The plaintiffs are an ancient corporation incorporated by Royal charter, and by a charter of 31 Eliz., confirming earlier charters, power was given to the plaintiffs "to hold, purchase, receive, and possess lands, tenements . . . . and hereditaments of what kind or nature soever they may be to them and their successors in fee and perpetuity, and also goods and chattels and other things of what nature or kind soever they may be."

By an order of the Board of Trade made under the Sea Fisheries Act, 1868, and confirmed by the Oyster and Mussel

Fisheries Order Confirmation Act, 1876, the power of regulating the oyster and mussel fishery in a part of the estuary of the Truro river, in the county of Cornwall, was conferred upon the plaintiff corporation. The order did not give the plaintiffs any power to acquire land on lease or otherwise. In June, 1897, the plaintiffs, in order to enable them to carry out more efficiently their powers under the said order, obtained from Colonel Tremayne a lease of the foreshore of the estuary of the Truro river for a term of fourteen years from Michaelmas, 1896. Owing to the fact that the water in which the oyster beds of the said fishery were situate was contaminated by copper from mines in the neighbourhood, the oysters were when freshly dredged unfit for the market, and the fishermen had been used from time immemorial to lay the oysters after dredging for a certain period upon a portion of the foreshore so leased to the plaintiffs as aforesaid. It was the practice for the fishermen by an arrangement among themselves to allocate to each individual a particular spot for the depositing of his oysters, which spot was indicated by stakes fixed in the ground. The defendant, a fisherman, in accordance with the said practice, was in the habit of depositing the oysters dredged by him upon a particular portion of the plaintiffs' foreshore. The plaintiffs sued the defendant in trespass. The defendant claimed to be entitled to use the foreshore in the manner complained of both by immemorial custom and also by the common law as incident to the public right of fishing. At the trial the jury found that what was done by the defendant did not amount to an occupation by him of a portion of the foreshore. The judge reserved for further consideration the questions, whether the plaintiffs being a municipal corporation had any power to take a lease of the foreshore, and had consequently any such title as would enable them to maintain trespass, and whether the right of depositing the oysters on the foreshore could legally exist as an incident of the right of fishing for oysters.

Duke, K.C., and *Hawke*, for the plaintiffs. The fact of the plaintiffs being a corporation is no objection to their holding a

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lease of land. The Mortmain Act, 1888 (51 & 52 Vict. c. 42), does not apply, for by s. 12 of that Act a corporation which is authorized by an existing charter to hold land is exempted from the operation of the Act, and the language of the plaintiffs' charter of 31 Eliz. is wide enough to include leaseholds. They also have power to take such a lease as that of the foreshore under s. 41 of the Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), which provides that "Where an order of the Board of Trade . . . . confers a right of regulating an oyster and mussel fishery . . . . the persons obtaining the order . . . . shall . . . . have power to do all or any of the following things; namely—(*c*) to provide for depositing and propagating oysters and mussels within the limits of the fishery and for improving and cultivating the fishery." The taking of the lease in question would assist the plaintiffs in effectuating that purpose.

Notwithstanding the finding of the jury, the Court ought to hold that the acts of the defendant in appropriating a particular defined portion of the foreshore for the purpose of habitually depositing the oysters thereon amounted to a taking of possession by him of that spot. And the occupation of a particular portion of the soil could not be regarded as incidental to the enjoyment of a public right of fishing in the sea. If it were so, and if every fisherman had the right to lay oysters as the defendant has done, the common law right of fishing would be self-destructive. The right of the public is confined to taking fish and carrying them away, and does not extend to the storing of fish upon the foreshore where the soil happens to be private property. The defendant will, unless restrained, acquire in course of time a statutory title to the portion of the foreshore used by him.

Foote, *K.C.*, and *Bodilly*, for the defendant. The depositing of the oysters on the foreshore is incidental to the public right of fishing because without it that right would be of no value. The finding of the jury that the defendant had no occupation of the soil is binding on the Court.

As to the title of the plaintiffs, the charter only gives power to hold lands in fee. The term "chattels" in the charter would not include a leasehold. Nor have the plaintiffs any

power to hold this lease under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50). By s. 105, a municipal corporation may purchase and hold a limited quantity of land for certain purposes of which this is not one. It may be that s. 107, which gives power to acquire land with the approval of the Treasury (now the Local Government Board), would cover the case of a leasehold; but here the approval of the Local Government Board had not been asked for. The Sea Fisheries Act, 1868, deals with two classes of fishery orders—those which confer a several fishery, and those which only give a right of regulation of a public fishery. It is only under the former class of orders that the grantees of the order are empowered to acquire a title in the soil of the foreshore.

Duke, K.C., in reply.

Cur. adv. vult.

Aug. 10. WILLS J. The plaintiffs complain of various acts done by the defendant which they allege are acts of trespass committed on parts of the foreshore of the port of Truro, of which the plaintiffs claim to be lessees from Colonel Tremayne by virtue of a lease for fourteen years granted in the year 1897. The acts complained of are the depositing of oysters which have been dredged up from the oyster beds in other parts of the harbour, and which are placed by the defendant in a particular spot and kept there until they are ready and wanted for sale in the market. The defendant is in the habit of keeping to a particular spot, which is very roughly indicated by withies stuck in the soil or bed under the sea. It is not quite clear upon my notes or upon the shorthand notes whether they are placed on the foreshore or below the line of the foreshore, but I have the strongest impression that it was mentioned in the course of the case that they are below low-water mark. Other fishermen do the like, and the practice has been the same as far back as living memory goes. It is not contended that the defendant has any legal right to the spot in question, but only that he has the right to use some part or other of the foreshore in this way to this extent and for this purpose as incidental to the right of fishing for oysters. The right is

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claimed both as a common law right and as existing by immemorial custom. The allocation of particular spaces to particular individuals is an act of comity among the fishermen themselves, and up to the present time it does not appear that any difficulty has arisen out of it. It is alleged by the plaintiffs that the time is at hand when, by the improvement of the fishery and the increase in the number of fishermen, difficulties will arise which will render the possession of the foreshore by them very desirable, if not necessary, for the regulation of the fishery. The plaintiffs also complain of these acts as amounting to an occupation of the soil which will in time give a title to the occupant.

The ground may be cleared at once to a certain extent. The jury have found, after a very careful and I think a dispassionate consideration, that the acts in question were not acts of occupation, but were incident to and practically necessary for the oyster fishing. The circumstances are peculiar. The oysters as gathered from some of the beds are contaminated with copper from the workings of the copper mines, and they require a prolonged stay in the particular locality in question to get rid of the copper. Oysters gathered from other beds are sometimes fit for use, and sometimes require to be laid down. It is needless to say that there is no temptation to keep the oysters unsold any longer than is necessary. The only importance of the facts relating to the use of the fishery is as explaining the necessity for a place of deposit. Without it the fishery would be of little value, and I think the jury, for that and other reasons which appeared in the course of the case, were justified in finding that the Truro oyster fishing requires such a place of deposit. The finding that the acts were not acts of occupation gets rid of the contention that the defendant is acquiring a title under the Statute of Limitations, and reduces the questions for my consideration to two, namely, Have the plaintiffs made out such a title as will enable them to maintain an action of trespass? and, secondly, Can a right of deposit on the foreshore legally exist as an incident to the right of fishing for oysters?

The plaintiffs do not appear upon the evidence to have

done any single act of possession or ownership since the lease was granted. There is no evidence, for instance, that they have taken money for ballast. They have, therefore, to rely upon the right of possession which flows from ownership, and upon the presumption of actual possession which follows upon the legal right. It becomes necessary, therefore, to consider the objections which have been taken to their title. They are two: first, under the Statutes of Mortmain, and, secondly, under the Municipal Corporations Act. The Statutes of Mortmain appear to me to have nothing to do with a short lease of fourteen years. It does not seem to be open to the class of objections which gave rise to the Statutes of Mortmain; and I find that both Shelford (The Law of Mortmain, ed. 1836, p. 9) and Tudor (Charitable Trusts, 3rd ed. 1889, p. 382) treat this as clear law, and give a number of authorities for the proposition. These objections, therefore, may be shortly dealt with and put on one side; and I may add that, as the Statutes of Mortmain do not apply, the licence to hold lands in fee, which it is plain from the charter of Elizabeth existed in the old charters, and which had no application to leaseholds, is equally beside the question. The licence to hold goods and chattels, which term is used in contradistinction to lands, cannot, I think, have any application to leases of land. As to the objection under the Municipal Corporations Act, s. 105 of the Act of 1882 confers power on corporations to purchase or hold a limited quantity of land for certain purposes without the consent of any authority, and s. 107 provides that with the consent of the Treasury (for which the Local Government Board is now substituted by s. 72 of the Local Government Act, 1888 (51 & 52 Vict. c. 41)), where the corporation had not power to purchase or acquire land or to hold land in mortmain, they may purchase or acquire land on any terms the Treasury approve; but I think it is clear from the reference to mortmain that the Act is speaking of the acquisition of lands in fee, or for such long terms as the Statutes of Mortmain apply to, and I do not think that the implied prohibition against going outside those sections has ever been applied in practice to prohibit the taking of land by a municipal corporation on

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short leases, or supposed to extend to such leases. I can see, therefore, no objection to the lease on that ground. But a municipal corporation as such has nothing to do with foreshore rights, and the limits of expenditure are prescribed by s. 140 and Sched. V., and I think that they forbid the payment by a municipal corporation as such out of the borough fund of such a rent as this, and that therefore, if the lease is to be supported, it must be so under other powers than those contained in that Act. This brings us to the question whether under the Sea Fisheries Act, 1868, and the order made in pursuance of that Act by the Board of Trade, and confirmed by the local Act of 1876 (39 & 40 Vict. c. xci.), any such power is conferred. There is neither in the Act of 1868 nor in the local Act any express power conferred on the grantees, who in the present case are the plaintiffs, to take and hold the foreshore. On the other hand, I start with the proposition that there is no statutory or other disability which prevents a corporation, merely because it is a corporation, from acquiring a short leasehold. It seems to me, therefore, that if this acquisition of the leasehold affords a reasonable facility to the corporation for the carrying out the purposes of their Act of 1876, they may acquire it. This view is much strengthened by s. 47 of the Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45). By s. 46 of that Act no fishery order can be obtained, where the Crown or the Duchies of Lancaster or Cornwall own the foreshore, without the consent of the owner, so that the Crown or the Duchy can make its own terms. By s. 47, if the foreshore belongs to a private owner no consent is necessary, but for the protection of the owner it is enacted that the order shall incorporate the Lands Clauses Act, 1845. This would, of course, give no power to buy any existing interest, freehold or leasehold, in the foreshore unless the special Act, that is the order confirmed by Parliament, should confer it, and even then it would be a power to buy an existing interest, not to create a new leasehold. But it is the clearest possible intimation that it may be a useful thing for the grantees to have the foreshore, and the section applies to both classes of orders—those which create several fisheries, and those which only give power to

regulate the fishery. I have come to the conclusion, therefore, that the acceptance of the lease is not ultra vires, and that therefore the right to possession draws the possession with it, and that, so far as this objection is concerned, the plaintiffs are not out of Court. For one reason I am not sorry to come to this conclusion, inasmuch as it avoids a purely technical difficulty, curable in another action, and leaves open the one real question that is important to the parties, namely, whether there is any legal objection to the finding of the jury that the acts complained of are incidental to the enjoyment of the right of oyster fishing. It appears to me to be a perfectly right conclusion. In fact, the greater part of this oyster fishery would be useless without it. I believe the same is true in varying degrees of advantage or necessity in most oyster fisheries. In this case oyster-laying is absolutely necessary to sweeten some of the oysters, and the source of pollution certainly existed long before legal memory, if one is at liberty to resort to history and tradition. I do not think, however, that it would make any difference if that were not so. The practice is traced back as far as living memory can go, and that is evidence of immemorial usage. Oyster-laying often has to be resorted to for the purpose of feeding and fattening the oysters before they are ready for consumption, and although oysters may be, and I believe often are, sold as they are dredged, yet they quite as often have to be deposited and left for a time before being fit for the market. There is an interesting article on oysters in the 9th edition of the Encyclopædia Britannica, in which the temporary laying of oysters for such purposes as I have mentioned is treated as a regular "concomitant" (to use the writer's phrase) of an oyster fishery; and I cannot see how any valid objection can be raised to a practice so widespread and ancient. The chief objection that has been made is that it amounts to an occupation of the soil. I think that is disposed of by the finding of the jury: it was clearly a question of fact for them, and in my opinion their finding is right. The mere fixing of a stake to indicate a spot is too trivial to talk about, even if it be on the foreshore, which I think is not the case. It is quite true that the oyster-

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laying may interfere with the uninterrupted user of the foreshore by the owner; but a like interference with territorial rights takes place in many instances which present no legal difficulty. The rights of inhabitants to recreate themselves on a village green have been repeatedly established by evidence and upheld by the Courts, and yet they may absolutely destroy all chance of the owner making any, or any but the slightest, beneficial use of land which is undoubtedly his. The custom here alleged is not open to the objection that it is in substance a claim to a profit à prendre, nor in my judgment to any other legal objection to its validity. Apart from custom, the owner of the foreshore owns and enjoys the foreshore subject to the common rights of all members of the public, which are such as to reduce the value of the foreshore in nine cases out of ten to something of very small pecuniary value. The owner cannot build on it, because the public have rights of passage over it everywhere per mare et per terram. In all but some exceptional cases he cannot graze it, because no herbage will grow upon it. Where herbage will grow upon it, as in the fens, I do not think oysters will be found to be composite factors. At all events, the enjoyment of the foreshore is subject to the common rights of fishing, and if oysters constitute a part of the fish to be taken, the right of fishing must include the necessary and practical incidentals, and if they involve the consequences that in some places the owner cannot dig ballast or sand for sale, as he can generally, he suffers no inconvenience or loss which is not common to him and the owner—for example—of the village green, who cannot dig pits or do other acts of ownership which would interfere with the rights of recreation of the inhabitants. I am of opinion, therefore, that whether the rights claimed be regarded as part of the common law rights of oyster fishing, or as claimable by immemorial custom, they can stand in law; and as they have been established in fact, the acts complained of by the plaintiffs are justified. Suggestions were made that the rights in question, if upheld, might lead to trouble between the fishermen, whose numbers it is said are increasing, so that the old comities observed between themselves will no longer meet the neces-

sities of the case. I do not think that such considerations affect the existence or non-existence of the rights. Inconvenience of this kind must always be liable to arise when the class of persons enjoying concurrent rights over a limited area comes to include more than can conveniently enjoy the rights simultaneously. The remedy lies usually in some form of legislation. In the present case it seems to be amply met by the powers of regulation given to the plaintiffs by the order of the Board of Trade confirmed by the Act of 1876. My judgment, therefore, must be for the defendant with costs.

Judgment for the defendant.

Solicitor for plaintiffs: *J. A. Bartrum, for R. Dobell, Truro.*

Solicitor for defendant: *S. James, for J. Messer Bennetts, Truro.*

J. F. C.

[IN THE COURT OF APPEAL.]

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THE KING *v.* GENERAL COMMISSIONERS OF TAXES FOR THE DISTRICT OF CLERKENWELL.

Revenue — Income Tax — Prohibition — Jurisdiction of Commissioners for District — Trade carried on partly in Great Britain — Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *ss.* 106, 108, 111–117.

An English company, incorporated under the Companies Acts, had its registered office in the district of Clerkenwell, and there carried on a business, in respect of the profits of which they were chargeable to income tax under Sched. D by the Commissioners for that district. For the purpose of the assessment of the company in respect of their profits, the Commissioners drew the inferences of fact that, having regard to the relations existing between the company and an American company trading at Rochester in the United States, the bulk of the shares in which was held by the English company, the business and profits of the American company were technically the business and profits of the English company, that the head, seat, and directing power of the company were at the registered office in London, and that, if the profits of the business carried on at Rochester were technically the profits of the American company, that company was for all purposes the agent of the English company. The English company applied for a writ of prohibition to the Commissioners to prohibit them from assessing that company in respect of the

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profits of the American company, on the ground that the business of the American company was not in truth the business of the English company, and that the Commissioners therefore had not, and could not by an erroneous decision on the facts give themselves, jurisdiction to assess the English company in respect of the profits of that business:—

Held, that, the Commissioners having jurisdiction under the Income Tax Act, 1842, s. 106, to assess the English company to income tax in respect of profits of a business, carried on either wholly or in part only in Great Britain, they had for the purposes of that assessment jurisdiction to decide all questions of fact necessary for ascertaining the amount of those profits, and therefore prohibition would not lie, the proper remedy, if the decision of the Commissioners were wrong in point of law, being by appeal upon a case stated.

APPEAL from an order of a Divisional Court (Channell and Phillimore JJ.), refusing to grant a rule nisi for a prohibition to the General Commissioners of Taxes for the district of Clerkenwell as after mentioned.

Kodak, Limited, is an English company, which was incorporated in November, 1898, under the Companies Acts, and has its registered office, and carries on the business of manufacturing photographic apparatus and materials, at 43, Clerkenwell Road, within the district of Clerkenwell. The Eastman Kodak Company is an American company, incorporated in accordance with the laws of the State of New York, which carries on business at Rochester and elsewhere in that State. Kodak, Limited, has acquired a large number of shares, amounting to about 98 per cent. of the whole, of the capital of the American company, the remaining shares to the number of 818, which represent nominal capital of the company to the amount of 16,000*l.*, being in the hands of thirty other shareholders. Assessments of income tax had been made upon Kodak, Limited, under Sched. D for the years 1899 and 1900, in the district of Clerkenwell. These assessments included, not only all the profits made by the English company, but also all the profits made by the American company. Kodak, Limited, appealed against these assessments to the General Commissioners of Taxes for the district of Clerkenwell. Upon the hearing of the appeals, the Commissioners stated in substance that, in their view of the facts, the business and profits of the American company were technically

the business and profits of the appellant company, that the head and seat, and directing power, of the appellant company were at its registered office in London, and that, if the business at Rochester and the profits made thereat were technically the business and profits of the American company, that company was for all purposes the agent of the appellant company. It was contended for the company that there were no facts which warranted these conclusions. It is not thought material for the purposes of this report to set out the facts and documents with regard to the relations between the two companies, some of which are alluded to in the judgments, the question, upon which the Court decided the case, being whether it was one in which prohibition would lie, on the assumption that the findings of the Commissioners were incorrect, and not whether those findings were correct.

Application was made to the Divisional Court for a rule nisi for a prohibition to the Commissioners to prohibit them from assessing, or confirming, or allowing any assessment on Kodak, Limited, to the income tax, Sched. D, in respect of the trade of the Eastman Kodak Company of Rochester, in the State of New York, U.S.A., or the profits of the trade carried on by that company, or in respect of any other income whatsoever than the profits and gains of Kodak, Limited, upon the following grounds, namely, that any such assessment was beyond and not warranted by any power or jurisdiction conferred by any Act or statute relating to the income tax, and was in excess of any jurisdiction so conferred; that the said trade was not carried on within the district of the said Commissioners or within the United Kingdom; and that the assessment did not comply with s. 106 of the Income Tax Act, 1842. The Divisional Court refused the application. Application was then made by way of appeal to the Court of Appeal for a rule nisi to the like effect, and granted. Notice of the rule was ordered to be served upon the surveyor of taxes for the district. (1)

(1) At the time of the application proceedings were pending by way of appeal against the decision of the Commissioners on a case stated.

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July 25. *Sir R. B. Finlay*, *A.-G.*, and *Rowlatt*, for the surveyor of taxes. The case is not one for a prohibition, inasmuch as the Commissioners are clearly not acting without jurisdiction, or exceeding their jurisdiction. By the 106th section of the Income Tax Act, 1842, the Commissioners for a district have jurisdiction to charge a person who carries on business within their district in respect of the profits of his business, whether it is carried on wholly or in part only in Great Britain: see *San Paulo Ry. Co.* v. *Carter* (1); *Apthorpe* v. *Peter Schoenhofen Brewing Co.* (2); *St. Louis Breweries* v. *Apthorpe*. (3) It is not, and cannot be, disputed that the English company carry on business within the district of Clerkenwell, and earn profits thereby, in respect of which the Commissioners have jurisdiction to assess them within that district. That being so, the Commissioners must under the section have jurisdiction to inquire into and determine what are the whole profits of the business, which the company in part carry on in Great Britain. There was in this case evidence for the Commissioners that the American company is under the control of the English company, and that in substance the business carried on in the United States is the business of the English company. If the decision of the Commissioners on the question whether that was so was wrong, the only remedy is by appeal upon a case stated, not by prohibition; for the Commissioners are not assuming jurisdiction, but are merely exercising a jurisdiction, the existence of which is necessarily involved by the scope of their functions under the Income Tax Act.

A. H. Spokes, appeared for the Commissioners.

Danckwerts, *K.C.*, and *Kerly*, for the company. It is a well-settled principle that, where the jurisdiction of a tribunal depends on a preliminary question of fact, the tribunal cannot give itself jurisdiction by an erroneous decision on that question. The Commissioners have no jurisdiction to assess an English company to income tax in respect of the profits of an independent American company, carrying on business in the United

(1) [1896] A. C. 31. (2) (1899) 4 Tax Cases, 41.
(3) (1898) 4 Tax Cases, 111.

States, and they cannot give themselves jurisdiction to do so by erroneously finding, contrary to the evidence, that the English company has the control of the American company, and that the latter is merely the agent of the English company. The question whether under such circumstances prohibition will lie is of great importance to the taxpayer, for on a case stated the only appeal is on a question of law, and the findings of fact by the Commissioners are conclusive. It cannot be that the Legislature intended that the subject should be entirely in the hands of the Commissioners with regard to questions of fact upon which their jurisdiction depends, and that there should be no power of controlling a decision by them entirely contrary to the facts. The American company is clearly an independent company, there being 818 shares, representing nominal capital to the extent of 16,000*l.*, which are held by thirty shareholders entirely independent of the English company. The large interest which is held by that company in the American company was obtained with a view merely to acquiring the power of preventing competition by the American company in England; but the two companies are quite distinct and independent, and any control which the English company has is merely quâ shareholder, and not as a company.

The Commissioners cannot have jurisdiction to tax one person in respect of profits made by another. The English company would no doubt be liable to income tax on dividends on their shares remitted to this country under the fifth case of the 100th section of the Income Tax Act, 1842, but that income tax is not chargeable by the Commissioners for the district of Clerkenwell, but under s. 108 by the Commissioners for London. In order to give the Commissioners jurisdiction to assess income tax in respect of the profits of the American business, the preliminary fact must exist that the business is that of a company which carries on business wholly or in part within the district of Clerkenwell: see *Colquhoun* v. *Brooks*. (1) In the absence of that fact the Commissioners are acting without jurisdiction, or exceeding their jurisdiction, because they are assessing that which is not a subject-matter of assessment under

(1) (1889) 14 App. Cas. 493.

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the Act. They cannot, by deciding wrongly that there is a subject-matter of assessment when there is not, give themselves jurisdiction. The case stands on a similar footing to that of a person assessed to poor-rate in respect of premises not in his occupation, in which case justices cannot give themselves jurisdiction by an erroneous finding that the premises are in his occupation: see *Milward* v. *Caffin* (1); *Governors of Bristol Poor* v. *Wait* (2); *Charleton* v. *Alway*. (3) There are many cases where, although of necessity the inferior tribunal must in the first instance inquire as to the facts upon which its jurisdiction depends, nevertheless the superior Court has power to examine them on motion for a prohibition: see *Liverpool Gas Co.* v. *Everton* (4); *Elston* v. *Rose* (5); *Re Penny* (6); *Bunbury* v. *Fuller* (7); *Thompson* v. *Ingham* (8); *Chew* v. *Holroyd*. (9)

Sir R. B. Finlay, A.-G., in reply. The cases cited with regard to poor and other rates made where there was no subject-matter of assessment are no doubt good law, but they are not applicable to the present case. They were not cases in which the rating authority or any inferior Court was invested with a power of determining conclusively the question of fact upon which jurisdiction depended. The Income Tax Act, 1842, s. 106, must give jurisdiction to the Commissioners to inquire whether there is a business carried on by a person within their district, either wholly or in part, and, if there is, then they clearly have jurisdiction to determine what the profits of that business are; and their determination, as regards mere questions of fact, is conclusive, and cannot be reviewed, the only appeal given being where their decision is erroneous in point of law. See the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), ss. 57–59. The case falls within the dictum of Lord Esher M.R. in *Reg.* v. *Commissioners for Special Purposes of the Income Tax* (10), where he says: "When an inferior Court or tribunal or body, which has to exercise

(1) (1779) 2 Wm. Bl. 1330.
(2) (1834) 1 A. & E. 264.
(3) (1840) 11 A. & E. 993.
(4) (1871) L. R. 6 C. P. 414, at p. 420.
(5) (1868) L. R. 4 Q. B. 4.
(6) (1857) 7 E. & B. 660.
(7) (1853) 9 Ex. 111, at p. 140.
(8) (1850) 14 Q. B. 710.
(9) (1852) 8 Ex. 249.
(10) (1888) 21 Q. B. D. 313, at p. 319.

the power of deciding facts, is first established by Act of Parliament, the Legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists, and is shewn to such tribunal or body, before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The Legislature may intrust the tribunal or body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the Legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none." He proceeds to say that in the latter case the formula that a tribunal, whose jurisdiction depends on the existence of certain facts, cannot give itself jurisdiction by a wrong decision on the facts is inapplicable. The cases as to poor-rate relied on for the company come within the first class of cases referred to by Lord Esher M.R.; but it is submitted that the present case falls within the second class which he mentions. [He also cited on this point *Reg.* v. *Bolton.* (1)]

It was held in *Apthorpe* v. *Peter Schoenhofen Brewing Co.* (2) and *St. Louis Breweries Co.* v. *Apthorpe* (3) that, where in reality a company in England controlled and managed the business which was in point of form carried on by an American company, the business was one partly carried on in Great Britain within the meaning of the Income Tax Act, 1842. There was abundant evidence for the Commissioners, having regard to the fact that the English company holds all the shares in the American company but a comparatively insignificant

(1) (1841) 1 Q. B. 66. (2) 4 Tax Cases, 41.
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proportion, and to the statements made in the prospectus of the English company and other matters, that in substance the English company controls and carries on the American business.

Cur. adv. vult.

Aug. 3. A. L. SMITH M.R. read the following judgment:—This is an appeal from a Divisional Court, consisting of Channell J. and Phillimore J., refusing to grant a rule nisi calling upon five of the General Commissioners of Taxes for the district of Clerkenwell to shew cause why a writ of prohibition should not issue prohibiting them from assessing to income tax under Sched. D or allowing an assessment on a company called Kodak, Limited, in respect of a trade carried on at Rochester, New York, which I will call the Rochester trade, and the facts out of which the present controversy arises may be shortly stated as follows. The Kodak Company carries on a business in this country within the jurisdiction of the Commissioners, and is undoubtedly liable to be assessed to income tax in this country, and a question has arisen between the Kodak Company and the Commissioners as to the amount of trade upon which the company is liable to pay income tax, the company asserting that they are not liable to pay income tax upon the profits of the Rochester trade, and the Commissioners, on the other hand, asserting that the Rochester trade is carried on by the Kodak Company in this country under such circumstances as to make the profits of the Rochester trade assessable to the income tax in this country and as profits of the Kodak Company; and it seems to me upon the authorities—*San Paulo Ry. Co.* v. *Carter* (1) and other cases—that, if the Rochester trade is carried on partly in this country and partly at Rochester, the profits of that trade are liable to be assessed to income tax in this country. Now, what is it that the General Commissioners of Taxes have to ascertain? Surely they have to ascertain what trade a taxpayer who is assessable to income tax is carrying on, and to do this it is within the jurisdiction of the Commissioners to ascertain what is the

(1) [1896] A. C. 31.

connection between the Kodak Company in this country and the Rochester business in America. This is what the Commissioners are doing, and I agree with the King's Bench Division that the assertion that the Commissioners have gone, or are going, wrong in determining this question gives no ground for prohibition. There is clearly evidence of a connection between the Kodak Company and the Rochester company, and, if the Commissioners go wrong, this is a matter for appeal as provided by the Taxes Management Act, 1880, and not prohibition. I think this application for a prohibition must be dismissed. The Commissioners have not gone wrong in the finding of any fact preliminary to giving themselves jurisdiction.

VAUGHAN WILLIAMS L.J. read the following judgment:— In this case a rule was obtained by Mr. Danckwerts on behalf of Kodak, Limited, calling on the General Commissioners of Taxes for the district of Clerkenwell, in the county of London, to shew cause why a writ of prohibition should not be awarded to prohibit them from assessing, or confirming, or allowing any assessment on Kodak, Limited, to the income tax, Sched. D, in respect of the trade of the Eastman Kodak Company, of Rochester, New York, in the United States of America, or the profits of the said trade carried on by the said Eastman Kodak Company, or in respect of any other income whatsoever than the profits and gains of Kodak, Limited, on the ground that such assessment is not warranted by any jurisdiction conferred by any statute relating to income tax, and is in excess of any jurisdiction so conferred.

Now, there is little or no dispute as to the facts upon which this rule has been obtained. The company known as Kodak, Limited, is possessed of the great bulk, some 95 or 98 per cent., of the shares in the Eastman Kodak Company. The relations between the English company, Kodak, Limited, and the American company, the Eastman Kodak Company, which was called in argument the Rochester company, are set forth in the prospectus of Kodak, Limited, issued in November, 1898. It is common ground that the Commissioners propose to assess

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Kodak, Limited, in respect of the profits of the trade of the Rochester company, on the ground that the American company is as a fact carried on by and is the business of Kodak, Limited, and that the profits and business are technically the profits and business of Kodak, Limited, and that the head and seat and directing power of Kodak, Limited, are at the office of that company in London, and that, if the business of the Rochester company and the profits made thereat are technically the business and profits of the American company, the American company for all purposes are the agents of Kodak, Limited. Kodak, Limited, deny that the facts, which are really not in dispute, and the relations of the two companies, as set forth in the prospectus, justify the inferences of the Commissioners, which form the grounds upon which the Commissioners propose to charge Kodak, Limited, to the duties in Sched. D, and allege that the business of Kodak, Limited, is wholly carried on in Great Britain, and that no part of it is carried on at Rochester, in the United States of America, and deny that the business and profits of the American company are the business and profits of Kodak, Limited. Kodak, Limited, contend that the facts assumed by the Commissioners as the grounds of assessment are facts, or inferences of fact, preliminary to the power or jurisdiction of the Commissioners to charge Kodak, Limited, in respect of the business and profits carried on and made at Rochester in the United States, and contend that the Commissioners cannot by finding facts or drawing inferences give themselves jurisdiction to charge Kodak, Limited, in respect of such business and profits. It is, on the contrary, contended on behalf of the Crown and the Commissioners that such facts and inferences of fact are not preliminary to the jurisdiction of the Commissioners, and that all that is necessary to found the jurisdiction of the Commissioners and to give them power to assess the duty to be paid by Kodak, Limited, is that Kodak, Limited, should be engaged in trade, as it is admitted Kodak, Limited, is, within the district of the Commissioners in Great Britain, and that the question whether the business carried on at Rochester is the business of Kodak, Limited, is not a question as to a fact preliminary to jurisdiction, but merely as to a

fact going to the quantum of the taxable liability of persons admittedly subject to the jurisdiction of the Commissioners in respect of the quantum of that liability. Kodak, Limited, reply that, even assuming that it is true that there is an admission that there is a jurisdiction to a certain extent in the Commissioners to charge and assess Kodak, Limited (which is denied in respect of an additional assessment which was made in respect of the earlier of the two years in question in this case, and which related exclusively to profits made at Rochester), yet that prohibition will lie as well in cases of excess of jurisdiction as it will in cases of total absence of jurisdiction.

The main question, therefore, which the Court has to decide in this case is whether, in the case of a trader admittedly carrying on business in Great Britain within the district of the Clerkenwell Commissioners, the alleged facts that Kodak, Limited, carry on a part of their business at Rochester, in New York, and that the business at Rochester is controlled by Kodak, Limited, and that the London office of Kodak, Limited, is the head and seat of the Rochester business, are, or any of them are, facts preliminary to the jurisdiction of the Commissioners to charge Kodak, Limited, in respect of the Rochester business, or whether such facts are merely facts going to the quantum of the taxable liability, or, in other words, to the amount of the liability. It was argued that, if Kodak, Limited, being an English company, had merely a registered office in London, and carried on no part of their business in Great Britain, and made no profits in Great Britain, it would be essential to the jurisdiction of the Commissioners to prove that Kodak, Limited, carried on the business of the Rochester company in respect of the profits of which the Commissioners proposed to assess Kodak, Limited. But for myself I do not think that the additional fact that Kodak, Limited, had a factory in London would make the proof of the fact that Kodak, Limited, carried on the Rochester business one whit less essential to the jurisdiction of the Commissioners to assess Kodak, Limited, in respect of the Rochester business. In either case one would have the fact that Kodak, Limited, was engaged in trade in London, although

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all that was done in London was to make the London office the head and seat of Kodak, Limited, which would not be the less taxable because it carried on its operations abroad. It would still be, within the judgment of Lord Halsbury in *San Paulo Ry. Co.* v. *Carter* (1), engaged in a trade or business carried on in Great Britain, if the head and brain, that is, the conduct and management of the trade or business, were located in Great Britain, although that might be a different place from that in which the corporeal subjects of trading were to be found. It seems to me that, whether one regards the decision in *Colquhoun* v. *Brooks* (2), or the decision in *San Paulo Ry. Co.* v. *Carter* (1), in either case it is essential to assessment under the first case of Sched. D that the trade, the profits of which are taxed, should in part be carried on within Great Britain: but it may be that, when once you have a person engaged in trade within Great Britain, the Commissioners in the district within which he carries on trade have jurisdiction to ascertain what are the limits of the trade so carried on, whether within or without Great Britain, for the purpose of fixing the quantum of the assessment; and on the whole I have come to the conclusion that this is the true view of the case, and that therefore this rule for a prohibition must be discharged.

I cannot, however, leave this case without expressing strongly my opinion that the case should be so stated as to raise the true question as to the liability of Kodak, Limited, to be taxable or charged under the first case of Sched. D. There is a real and important question of law to be determined. The case should not be so stated as to state the Kodak Company out of Court without reference to the real question of law raised by the facts. To find in this case as a fact that the business carried on at Rochester is the business of Kodak, Limited, would go far to render it impossible to raise on the special case the question what is the legal effect of the possession of 95 per cent. of the shares in a foreign company when coupled with the facts stated in the prospectus, and the existence of the power of attorney to Eastman, and any

(1) [1896] A. C. 31. (2) 14 App. Cas. 493.

material fact not in dispute which the party to be taxed may desire to have stated on the special case.

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STIRLING L.J. read the following judgment:—The question in this case is whether a writ of prohibition should issue to prohibit the General Commissioners of Income Tax for the district of Clerkenwell from assessing, or confirming, or allowing any assessment on a company named Kodak, Limited, to the income tax, Sched. D, in respect of the trade of the Eastman Kodak Company of Rochester, in the State of New York, U.S.A., or in respect of any other income whatsoever than the profits and gains of Kodak, Limited.

The facts which give rise to the question are these. Kodak, Limited, is an English company, incorporated in November, 1898, under the Companies Acts, 1862 to 1898, and having its registered office and carrying on business at 43, Clerkenwell Road, within the district of Clerkenwell. The Eastman Kodak Company is a company incorporated in accordance with the laws of the State of New York, and carries on business at Rochester and elsewhere within that State. Kodak, Limited (hereafter called the English company), has acquired a large number of shares, amounting to about 98 per cent of the whole, of the capital of the Eastman Kodak Company (hereafter called the American company): the other shares, 818 in number, and representing a nominal capital of 16,000*l.*, are in the hands of thirty shareholders, who are stated to be entirely independent of the English company. Assessments of income tax have been made under Sched. D for the years ending April 5, 1899, and April 5, 1900. Both assessments include, not only all the profits of the English company, but also all the profits of the American company. In respect of the former assessment a payment has been made which covers the whole profits of the English company; no payment has been made in respect of the latter. Both assessments have been appealed against; and it is alleged that the Commissioners propose to find as facts that the business of the American company is the business of the English company; that the head and seat of the business is at the registered office in London of the English

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company; and that the American company is the agent of the English company.

On April 15, 1901, an application for a writ of prohibition was made to a Divisional Court consisting of Channell J. and Phillimore J. who refused to grant it. On April 16 an application for a rule nisi was made by way of appeal, and was granted by the Court of Appeal; and it is now sought that this rule should be made absolute.

Income tax under Sched. D is (s. 100 of the Income Tax Act, 1842) to be assessed and charged under certain rules applicable to particular cases, of which the first and fifth may be mentioned; the first being "Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade," and the fifth, "The duty to be charged in respect of possessions in the British plantations in America, or in any other of Her Majesty's dominions out of Great Britain, and foreign possessions." The duty under the first case is to be computed on a sum not less than the full amount of the balance of the profits or gains of the trade; that under the fifth case on a sum not less than the full amount of the actual sums received in Great Britain.

It was held in *Colquhoun* v. *Brooks* (1) that a partner, resident in Great Britain, in a business carried on *entirely* abroad, was liable to be assessed for income tax under the fifth case, and not under the first case. On the other hand it was held in *San Paulo Ry. Co.* v. *Carter* (2) that a company registered in England under the Companies Acts, and having its registered office, and carrying on part of its business, in England, was liable to be assessed under the first case, although the business consisted largely in carrying on a railway in Brazil, the property of the company. The main ground on which these decisions were arrived at was, as is pointed out by Lord Watson in *San Paulo Ry. Co.* v. *Carter* (3), that the Income Tax Acts provide machinery for assessing the duty under the first case where the trade is carried on wholly or in part in England, but not where it is carried on exclusively out

(1) 14 App. Cas. 493. (2) [1896] A. C. 31.
(3) [1896] A. C. 31, at p. 39.

of the United Kingdom, while they do provide machinery for assessing the duty under the fifth case where the trade is exclusively carried on outside the United Kingdom. But, says Lord Watson, a person interested in the profits of a trade, and resident in the United Kingdom, "cannot according to the rule established in *Colquhoun* v. *Brooks* (1) escape from liability under the first case, unless he is able to shew that no part of the trade is carried on within the United Kingdom, or, what comes to precisely the same thing, that the trade is exclusively carried on in a country or countries outside the United Kingdom, whether subject to Her Majesty or not. If he succeeds in proving that fact his liability will be under the fifth case."

In *Apthorpe* v. *Peter Schoenhofen Brewing Co.* (2), before the Court of Appeal, and *St. Louis Breweries* v. *Apthorpe* (3), before a Divisional Court, consisting of Wills J. and Bruce J., the principle established by *San Paulo Ry. Co.* v. *Carter* (4) has been applied to the case of companies registered and carrying on part of their business in England, and having control over foreign companies carrying on business abroad. The question to be ultimately decided between the Crown and Kodak, Limited, the English company, will be whether the tax is to be assessed under the first case in accordance with the decisions last referred to, or under the fifth case in accordance with *Colquhoun* v. *Brooks*. (1) At present what we have to consider is whether the Commissioners of Income Tax for Clerkenwell have jurisdiction to decide the questions of fact which they propose to determine.

This brings me to the consideration of the machinery provided for assessing the duty in the two cases. Sect. 106 of the Act of 1842 provides that "every person engaged in any trade . . . . shall be chargeable by the respective Commissioners acting for the parish or place where such trade . . . . shall be carried on . . . . whether such trade . . . . shall be carried on . . . . wholly or in part only in Great Britain." It further imposes an obligation on every person to make a declaration stating (amongst other things) in what place he is chargeable,

(1) 14 App. Cas. 493.
(2) 4 Tax Cases, 41.
(3) 4 Tax Cases, 111.
(4) [1896] A. C. 31.

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and whether he is engaged in any trade, and, if so, where the same is carried on. Sect. 108 provides that the duty to be assessed in respect of profits and gains arising from foreign possessions (i.e., Sched. D, Fifth Case) may be stated to and assessed by the Commissioners acting for London, Bristol, Liverpool, and Glasgow. Sect. 110 provides that every person carrying on trade in two places shall, if required, deliver at each the proper declaration or statement, but is not to be liable to any double charge by reason thereof.

It was contended by Mr. Danckwerts in support of the rule that the Commissioners for Clerkenwell had no jurisdiction to assess duty except in respect of trade carried on within the district of Clerkenwell, and that they only acquired jurisdiction to assess duty in respect of the trade of the American company by an erroneous finding of fact, namely, that the business of the American company is the business of the English company. The answer of the Attorney-General, who appeared for the surveyor of taxes, was that, however erroneous the decision of the Commissioners may be, the remedy of the English company is by appeal and not by way of prohibition. This was the view taken by the Divisional Court, and, in my opinion, it is correct. As has already been pointed out, the decision in *San Paulo Ry. Co.* v. *Carter* (1) rests on this—that there is found in the Income Tax Acts appropriate machinery for assessing the duty where a person resident in England carries on a trade partly in the United Kingdom and partly abroad. That assessment must be made by the persons designated by s. 106 of the Income Tax Act of 1842—that is, the Commissioners for the place where the trade is carried on within the United Kingdom; if not made by them the person carrying on the trade would escape taxation in respect of the portion of the trade carried on abroad. That being so, it appears to me that s. 106 confers on those Commissioners jurisdiction to charge any person carrying on a trade within their district in respect of the *whole* profits of his trade whether that trade be wholly or only partly carried on within their district; or, in other words, the only essential requisite to the existence of the juris-

(1) [1896] A. C. 31.

diction to charge a trader in respect of the whole profits is that he be found within the district carrying on the trade in part. Having jurisdiction to charge in respect of all profits, they have jurisdiction to decide all questions of fact necessary for making the full assessment, and, therefore, to determine the true extent of the trade. In my opinion it is not true to say that the facts found by the Commissioners in the course of an inquiry properly entered upon give the jurisdiction; and I think that in principle the case falls within a long series of decisions, of which *Reg.* v. *Bolton* (1) is an example. In the present case it is not disputed that the English company does carry on a trade within the district of the Clerkenwell Commissioners, and, in my judgment, the latter have not exceeded their jurisdiction. I think, therefore, that the rule ought to be discharged.

I cannot refrain from adding that it appears to me that questions of law of difficulty and nicety arise in this case, and I must express the hope that all parties will concur in procuring a case to be so stated that the Court which has to decide them may be in possession of all facts necessary for the proper determination of them.

Rule discharged.

Solicitor for the Crown: *Solicitor for Inland Revenue.*
Solicitors for Commissioners: *Boulton, Sons & Sandeman.*
Solicitors for company: *Kerly, Son & Verden.*

(1) 1 Q. B. 66.

E. L.

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June 13, 14;
Aug. 3, 9.

[IN THE COURT OF APPEAL.]

STEAMSHIP BALMORAL COMPANY *v.* MARTEN.

Insurance, Marine—Policy—Ship valued for Policy at less than Real Value—General Average Loss—Salvage—Liability of Underwriter.

The defendants insured the plaintiffs' ship for 33,000*l.*, at which sum the ship was valued in the policy. During the currency of the policy a general average loss was sustained, and a sum awarded in a salvage action had also to be paid. In the salvage action the value of the ship was proved to be 40,000*l.*, and in the average statement that sum was taken as the contributory value of the ship, and the rights of all parties were adjusted on that footing. In an action on the policy:—

Held, that the defendants were only liable to make good to the plaintiffs thirty-three fortieths of the salvage and general average losses.

APPEAL from a decision of Bigham J. sitting in the Commercial Court. (1)

The plaintiffs, the owners of the steamship *Balmoral*, by a policy or policies subscribed by the defendant and other underwriters at Lloyd's, effected an insurance on their vessel for twelve months from December 3, 1898. The insurance was expressed in the policy to be upon hull, tackle, furniture, &c., valued at 20,000*l.*, and upon machinery, boilers, &c., valued at 13,000*l.*, making a total of 33,000*l.* During the currency of the policy, in consequence of an injury to the rudder, a general average loss was sustained, and a salvage action was subsequently instituted in the Admiralty Court in which a salvage award was made against ship, freight, and cargo; a general average statement was then made up by a firm of average adjusters. In the salvage action the value of the vessel was proved by an affidavit of the owners to be 40,000*l.*, and in making out the average statement the average adjusters took that sum as representing the contributory value of the ship. The plaintiffs sought in this action to recover from the defendants the whole of the ship's proportion of the salvage and of the general average contribution so found by the average

(1) [1900] 2 Q. B. 748.

adjusters; while the defendants contended that, as the vessel was only valued in the policy at 33,000*l.*, they were only liable to pay thirty-three fortieths of that amount.

At the trial evidence was called on behalf of the defendants which shewed that there was a well-known and long-established practice in England that where, as in the present case, a ship was valued in an insurance policy at a sum less than that which was taken as her value for the purposes of a salvage award or of a general average adjustment, the underwriters were only liable to pay to the shipowner a sum which bore to the sum insured the same proportion that the insured value bore to the value upon which the salvage award or general average adjustment was based. Bigham J. held that the defendants were only liable to make good to the plaintiffs thirty-three fortieths of the salvage and general average losses. The plaintiffs appealed.

Joseph Walton, K.C., and *Leck*, for the plaintiffs. The plaintiffs are entitled to recover the full amount of the ship's contribution in respect both of the salvage and general average losses. The ship was valued in the policy at 33,000*l.*, and was insured for that amount; she must therefore be taken to be a fully insured ship, the value of which has been fixed by agreement between the owners and underwriters at 33,000*l.* As between the owners and underwriters the policy value cannot now be opened, and, the ship being treated as fully insured, the policy value cannot be treated as between the parties as anything but the real value; to hold otherwise would be to open the policy value and substitute a value different from that to which the parties to the policy had agreed. A contract of insurance is a contract of indemnity, and the plaintiffs are entitled to be indemnified on the basis that the ship is a fully insured ship, and to be paid by the underwriters that which they have lost—that is, the full amount of the expenditure apportioned to the ship both in respect of salvage and general average loss. It makes no difference as between the owners and underwriters that other parties have to contribute to the loss: they are dealing under the policy with the ship only, and,

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although the amount of the ship's contribution may depend on the amount payable by other interests, it is immaterial to the underwriters (in the absence of fraud) how that amount is arrived at. If the claim had been one that could have come under a suing and labouring clause, the value in the policy would have been conclusive: *Dixon* v. *Whitworth* (1); and although salvage does not come within the suing and labouring clause—*Aitchison* v. *Lohre* (2)—there is no difference in principle which would prevent the policy value being conclusive in the case of salvage and general average losses. Even if the ship is not to be treated as fully insured, a salvage loss ought not, as between owners and underwriters, to be treated on the same basis as a partial loss of goods, in which case the policy value may be opened and the true value looked at; it should be treated rather on the same basis as repairs, where the amount recoverable from the underwriters is the cost of the repairs less an allowance of one-third for the substitution of new material for old; in other words, the owner gets an indemnity for his expenditure on repairs. On that basis, and apart from the admitted practice, a shipowner would be entitled to recover from the underwriters the exact sum paid by him as salvage, and the practice of average adjusters is immaterial and does not bind the Court: *Svendsen* v. *Wallace* (3), following *Atwood* v. *Sellar* (4), where the Court declined to follow a practice which had existed for seventy or eighty years.

[They also cited *Pitman* v. *Universal Marine Insurance Co.* (5); *North of England Insurance Association* v. *Armstrong* (6); *Irving* v. *Manning* (7); *Dickenson* v. *Jardine* (8); *The Mary Thomas* (9); *Lewis* v. *Rucker* (10); *International Navigation Co.* v. *Atlantic Mutual Insurance Co.* (11)]

Pickford, K.C., and *Scrutton, K.C.*, for the defendants. The underwriters are not seeking to open the policy, but are adhering to it; they contend that, as in the case of damage to

(1) (1879) 4 C. P. D. 371.
(2) (1879) 4 App. Cas. 755.
(3) (1885) 10 App. Cas. 404.
(4) (1879) 4 Q. B. D. 342.
(5) (1882) 9 Q. B. D. 192.
(6) (1870) L. R. 5 Q. B. 244.
(7) (1847) 1 H. L. C. 287.
(8) (1868) L. R. 3 C. P. 639.
(9) [1894] P. 108.
(10) (1761) 2 Burr. 1167.
(11) (1900) 100 Fed. Rep. 304.

goods, the amount recoverable from the underwriters must be based upon the agreed value in the policy. No doubt in the case of money coming within the suing and labouring clause, and also in the case of repairs, the underwriters must pay the whole amount expended, which is the measure of the indemnity to which the shipowner is entitled; but here the underwriters are being asked to pay the ship's proportion of salvage and general average upon a ship worth 40,000*l.*, although for the purposes of the policy the value had been taken between the parties at 33,000*l.* Theoretically, the way to arrive at the underwriter's liability would seem to be to take the ship's value at 33,000*l.* for the purposes of the average adjustment; but it is simpler to follow the long-established practice of average adjusters, by which in the present case the underwriters can only be called upon to pay thirty-three fortieths of the sum arrived at by taking 40,000*l.* as the ship's contributory value. *Dixon* v. *Whitworth* (1) is not an authority, for the principle upon which that case was decided, that salvage came within the suing and labouring clause, was overruled by the House of Lords in *Aitchison* v. *Lohre.* (2) The case is not analogous to that of repairs to a ship, for in that case the value of the ship is not an element in ascertaining the amount of the indemnity to which the assured is entitled; in the present case, in order to get at the liability in respect of which the assured claims an indemnity, it is necessary to arrive at the value of the ship for the purposes of the average adjustment, and that value has been agreed between the parties to the policy at 33,000*l.*; the value of the ship is the very root of the question between the parties. The expenditure in respect of which the plaintiffs are entitled to be indemnified is not in the nature of something which they have themselves had to pay, but is their contribution to a sum expended on behalf of all concerned; and if this sum is to be arrived at by taking the ship at a value higher than the agreed value, it is the plaintiffs who are trying to open the policy.

Walton, K.C., in reply.

Cur. adv. vult.

(1) 4 C. P. D. 371.

(2) 4 App. Cas. 755.

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Aug. 9. The following written judgments were delivered:—

A. L. SMITH M.R. In this case the plaintiffs insured their ship with the defendants for the sum of 33,000*l.*, the ship in the policy being valued at the agreed sum of 33,000*l.* During the time covered by the policy an average loss was sustained, which, taking the ship at its real value of 40,000*l.*, not at its agreed value of 33,000*l.*, amounted to the sum of 56*l.*, and a salvage award had also to be paid by the plaintiffs which amounted to the sum of 472*l.*, taking the ship at its real value of 40,000*l.*, and not at its agreed value of 33,000*l.* The question is whether the plaintiffs can recover from the defendants upon this policy the whole of either of these two amounts. Bigham J. has held that they cannot; and I think for the reason hereafter given that he is right. It is not denied that his judgment is in accordance with the practice in vogue in this country when a ship is valued in a policy by agreement of the parties at less than its real value. I am aware that if it be shewn that a practice is erroneous it is not binding upon me: see *Atwood* v. *Sellar* (1) and *Svendsen* v. *Wallace* (2); and I also know that the practice in America is not the same as here. But what is it that the plaintiffs are seeking to do? They are carrying in upon a valued policy a claim based, not upon the agreed value between the parties of the thing insured, namely, upon a value of 33,000*l.*, but upon a value of 40,000*l.* In my judgment the agreed value, apart from fraud, is binding between the assured and the underwriter whenever a claim is made by the one against the other upon a valued policy, and it is not competent for the assured any more than for the underwriter to open the value agreed to in the policy.

The underwriter's answer to the claim now made by the plaintiffs is this: "My liability to you by agreement between you and me was to be based upon the ship insured being of the value of 33,000*l.*, no more and no less, and I am therefore not liable to pay claims based upon a value in excess of that amount." For these reasons I think the practice in existence in this country is correct, and that the judgment of Bigham J. is right, and this appeal should be dismissed with costs.

(1) 4 Q. B. D. 342. (2) 10 App. Cas. 404.

VAUGHAN WILLIAMS L.J. In this case the ship *Balmoral* was insured for 33,000*l.*, and was valued in the policy at the same sum. During the currency of the policy a general average loss was sustained, and a salvage claim had to be paid by the owners under a salvage award for salvage services to the ship. The real value of the ship for the purpose of the salvage award and at the time of making up the average statement was taken to be 40,000*l.* This value of 40,000*l.* was agreed upon as the value of the ship between the owners and the salvors, the amount being a compromise to save the expense of a valuation. In adjusting the general average and salvage charges the adjusters took the contributory value of the ship at 40,000*l.*, but treated the general average and the salvage charge differently. They charged the whole of the salvage charges to the ship, but made the insurance for 33,000*l.* pay only thirty-three fortieths of the total share of the general average falling on the ship. The underwriters contended that they were only liable to pay salvage charges to the extent of thirty-three fortieths, as the ship was valued in the policy at 33,000*l.* and not at 40,000*l.*, and this action was brought to determine the extent of the liability of the underwriters.

Mr. Danson, an average adjuster, gave evidence that there was a well-known practice amongst English underwriters that when a vessel was insured for a sum less than the contributory value upon which general average was adjusted, or less than the amount at which the vessel was valued in a salvage action, the underwriters were only liable to pay in the proportion of the insured value to the contributory value or salvage value.

The case is not free from difficulty. The policy is a valued policy on the ship. Both sides are agreed that as between the underwriters and the shipowners, the parties to the policy, the policy value cannot be opened; but each side says that the other is making a claim inconsistent with the valued policy. The shipowners say that according to the terms of the policy the ship is, between themselves and the underwriters, a fully insured ship, and that the underwriters cannot consistently with the policy maintain that the ship is only insured to the extent of thirty-three fortieths, or that the shipowners are their own

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insurers to the extent of seven fortieths. On the other hand, the underwriters say that they insured the ship on the basis of the ship being worth 33,000*l.*, and that the shipowners had no right to ask them to pay on the footing of the ship being worth 40,000*l.* Bigham J. decided in favour of the contention of the underwriters, chiefly on the ground, I think, of Mr. Danson's evidence, which proved undoubtedly that there was a well-known practice in England amongst underwriters and average adjusters whereby, if the policy value of the ship is less than the contributory value adopted in the average adjustment, or less than the amount at which the ship was valued in a salvage action, the same proportionate rebate is made upon the average assessment against the ship when indemnity is sought against the underwriters, unless otherwise provided in the policy.

In my judgment it is necessary, in order to arrive at a decision between these respective contentions, to ascertain the nature of the claim of the insured owner in cases where there has been either a general average sacrifice, or payment of general average contribution, or payment of the whole or a contributory share under a salvage award. In each of these cases the claim of the insured owner is a claim for a loss by perils of the sea: either something has been sacrificed to avert a peril for the benefit of all, or salvage has been paid for the benefit of all; but there is an obvious difference in the links of the chain of cause and effect between a case where masts have been sacrificed or cargo jettisoned to avert a peril of the sea and a case where the loss consists of the sum which has to be contributed, so as to distribute the burden of the general average sacrifice or the burden of the salvage award. In the former case a part of the ship has been lost by a voluntary sacrifice necessitated by perils of the sea; whereas in the latter cases it is impossible to say what loss there has been until the general average contribution has been adjusted, or until the salvage award has been made and the burden of it distributed. It is argued that this difference affects the nature and measure of the loss as between the underwriters and the insured owner, and also affects the right of the insured owner to recover from the underwriters

the whole of the loss by perils of the sea without reference to contribution from other owners who have had the benefit of the sacrifice, leaving the underwriters to get a contribution from such owners by virtue of subrogation. To a certain extent this is, I think, plainly true. Losses for which underwriters are liable without any adjustment, and losses for which underwriters are liable only after adjustment, differ in two respects: the former can be recovered as particular average losses, which the latter generally cannot. The former losses fall within the rule in *Dickenson* v. *Jardine* (1), in which it was decided that, in a case of jettison of goods entitling the cargo-owner to general average contribution from the owners of the ship, the insured cargo-owner is entitled to recover from the underwriters the whole amount insured without having first collected the contribution to which he was entitled from the ship and other owners of cargo, and that the underwriters, having paid the cargo-owner, would be entitled to stand in his place with respect to general average contribution. Whereas losses for which the underwriters are only liable after adjustment clearly cannot be sued for until after adjustment, and then only to the extent of the insured owner's share of liability according to the statement of the average adjusters.

The decisions of Gorell Barnes J. and of the Court of Appeal in *The Mary Thomas* (2) seem to make it clear that underwriters are only liable for general average expenditure after adjustment, and to the extent of the contribution due according to the average statement from the insured owner of ship, cargo, or freight, as the case may be; and *The Mary Thomas* (2) seems also to establish that *Dickenson* v. *Jardine* (1) has no application to such a case. *The Mary Thomas* (2), however, is not conclusive as to the case of salvage in the strict sense of the word; it is not conclusive as to salvage by a volunteer independent of agreement, for it will be seen that in *The Mary Thomas* (2) the operations after the stranding were done under the orders of the master—just as in the present case the work of the *Gamecock* was done under the master's orders. In all these cases the liability of the underwriters is to simply recoup the insured

(1) L. R. 3 C. P. 639. (2) [1894] P. 108.

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owner his share of expenditure incurred by the master for the benefit of all.

I think, however, that even in the case of salvage proper the liability of the underwriter is only to pay the share of the salvor's remuneration awarded against the owner whom he has insured from loss by perils of the sea. The outcome of all this is that neither in a case of general average contribution nor in the case of salvage proper is the underwriter a guarantor of the contributions due under the average statement or the salvage award from the other owners interested; but still the loss by ship in having to pay salvage is not a loss dependent on the salvage being for the benefit of owners other than the shipowner: see Arnould on Marine Insurance, 3rd ed. pp. 728, 729; 7th ed. pp. 973, 974. It is a direct loss by the peril of the sea which the salvors are entitled to recover from each owner to the extent that their volunteer services have benefited him. The liability does not seem to me to arise out of the equities of the owners inter se or out of the Rhodian law. To that extent the liability of the shipowner or the cargo-owner or other owner, as the case may be, to pay his share of salvage remuneration differs from his liability to pay his share of general average loss, and resembles a loss by jettison; salvage, however, is generally not expressly named in marine policies, but it is to be remembered that the liability of the underwriter does not depend on the words of the policy, but upon salvage being made by the law of the land or the general law maritime a direct and immediate consequence of perils of the sea.

Assuming that salvage is a partial loss of a ship by perils of the sea which can only be recovered after the liability of the ship has been determined by the award of the Court fixing the share of liability, and that the underwriter can in no case be subrogated to the rights of the insured owner, and that therefore so much of the judgment in *Dickenson* v. *Jardine* (1) has no application, yet there remains the question how far the underwriters can resist payment of the share of salvage which the ship has had to pay. It is a loss by the perils of the sea; the shipowner has had to pay that amount; primâ facie, the

(1) L. R. 3 C. P. 639.

underwriters are bound to indemnify him against this loss. What is it that gets rid of this primâ facie obligation? The suggestion is that it is got rid of by the fact that the full value of the ship has been agreed in the policy at 33,000*l.*, and the salvage award has been based on a value of 40,000*l.* It is said that this agreement estops the owner as a party to the policy from enforcing against the underwriters any indemnity against a loss based on a value inconsistent with that value. Secondly, it is said that the rule in cases of partial loss is to ascertain the proportion of the contribution of the ship to the total salvage expenditure according to the values and amounts on which the liability of the ship has been fixed by the Court which disposed of the salvage action, and that there the liability of the underwriters will be the same proportion of the policy value. It may be that this is a convenient rule of thumb, but it is not the logical outcome of holding the parties to the policy to be bound by the figure of the policy value, and it is to be recollected that the salvage valuation is based on the value of the damaged ship as salved, and the policy value is the value of the sound ship.

In the case of *Irving* v. *Manning* (1) it appears, by the opinion of the judges delivered by Patteson J., that the meaning of a valued policy is not that as between the parties to the policy the policy value shall for *all* purposes be taken to be the value of the ship, but only that for the purpose of ascertaining the amount of compensation to be paid to the assured when the loss has happened the value shall be taken to be the sum fixed. The judges having arrived at that conclusion go on to approve the doctrine established by *Lewis* v. *Rucker* (2), that on a valued policy of goods the amount to which the underwriters ought to be held liable for a partial loss is to be ascertained by computing such a proportion of the value in the policy as the difference between the price for which sound goods would have sold at the port of delivery and that for which the damaged goods actually sold bore to the price for which sound goods would have sold; and then Patteson J. goes on to say, "But the extent and nature of the loss

(1) 1 H. L. C. 287. (2) 2 Burr. 1167.

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being ascertained by this comparison, the underwriter was held liable to pay the proportion so ascertained of the value in the policy." This is not the way in which losses by actual damage to the ship are measured for the purpose of ascertaining the quantum of the liability of the underwriters. The underwriters have to pay the whole expense of repairs whether the policy value be high or low, less one-third for new work substituted for old, provided only such expenses do not exceed the total sum insured.

Now, ought salvage expenses to be measured against the underwriters on the basis of a partial loss of goods or on the basis of repairs? Apart from the established practice spoken to by Mr. Danson, I should have thought that the measure of the loss against which the underwriters had to indemnify the shipowner was the actual sum which the shipowner had to pay for salvage, and that this was so whether the valuation in the policy was above or below the actual value. Salvage expenditure is the sum which the shipowner has had to pay to save the underwriters from a total loss. It does not seem to me to matter how that sum is arrived at. It is not in its origin a computation of the quantum of compensation which the underwriters have to pay the shipowner; it is a computation of the sum which the shipowner has to pay to save the underwriters from a total loss—that is, of the sum which the shipowner has to pay to save the ship from perils of the sea; and this is clearly a direct loss by perils of the sea. But the evidence seems to shew that in the case of salvage claims caused by a policy of insurance the measure adopted in *Lewis* v. *Rucker* (1) has been applied for a very long time, and with much hesitation I am concurring in affirming the decision of Bigham J.

STIRLING L.J. This is an action by the owners of the steamship *Balmoral* against the underwriters of a time policy of marine insurance for 33,000*l.*, the ship being valued in the policy at 33,000*l.* During the currency of the policy the rudder of the vessel was injured, in consequence of which a general average loss was incurred, of which the principal item

(1) 2 Burr. 1167.

was a payment of 100*l.* for the service of two tugs; and further, a salvage award to the amount of 500*l.* was made against the plaintiffs. For the purpose of this award the value of the ship was taken to be 40,000*l.*; and this value was also taken as the basis of the adjustment of the two sums of 100*l.* and 500*l.* as between the owners of the ship, cargo, and freight. The plaintiffs sue the underwriters to recover what has been apportioned by the adjuster as the shares of the 100*l.* and 500*l.* to be borne by the ship, and thus claim that the whole of this apportioned amount should be paid to them under the policy; the defendants, on the other hand, set up that they are only liable for thirty-three fortieths of the same amount. Bigham J. at the trial decided in favour of the defendants' contention, and from his decision an appeal is now brought.

There is no dispute that the plaintiffs are entitled to recover on the policy in respect both of the average loss and the salvage award. Inasmuch, however, as the ship was insured at the full amount of the agreed value, the plaintiffs urge that the contract of the defendants is from its nature one of indemnity; that the plaintiffs have suffered a loss to the full amount apportioned to the ship, and that primâ facie they ought to be indemnified to that extent. It is, however, contended on behalf of the defendants that inasmuch as by agreement between the parties the ship has been valued at 33,000*l.*, the plaintiffs must be taken to have contracted that for the purposes of the policy the ship shall be taken to be of that value; that when the claim of the plaintiffs is investigated, it is found to be based on the ship being of the value of 40,000*l.*; and that under the contract they are only bound to pay the sum which would have been payable if in the adjustment of the average and in the salvage proceedings the value of the ship had been 33,000*l.*

Now, in the case of *Irving* v. *Manning* (1) a ship was insured by a policy in which the value was stated at 17,500*l.* The ship suffered damage while on the voyage, and the amount necessary to repair her was estimated at 10,500*l.*, while her value if repaired would only have been 9000*l.* The assured

(1) 1 H. L. C. 287.

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having abandoned her claimed for a total loss, and this claim was upheld by the House of Lords. The opinion of the judges who were consulted by the House of Lords was delivered by Patteson J., who says: "By the terms of it"—the policy—"the ship, &c., for so much as concerns the assured, by agreement between the assured and assurers, are and shall be rated and valued at 17,500*l*., and the question turns upon the meaning of these words. Do they, as contended for by the plaintiff in error, amount to an agreement that for all purposes connected with the voyage, at least for the purpose of ascertaining whether there is a total loss or not, the ship should be taken to be of that value, so that when a question arises whether it would be worth while to repair, it must be assumed that the vessel would be worth that sum when repaired? or do they mean only, that for the purpose of ascertaining the amount of compensation to be paid to the assured, when the loss has happened, the value shall be taken to be the sum fixed, in order to avoid disputes as to the quantum of the assured's interest? We are all of opinion that the latter is the true meaning; and this is consistent with the language of the policy, and with every case that has been decided upon valued policies." After referring to and discussing the previous cases on the subject, Patteson J. continued: "The principle laid down in these latter cases is this: that the question of loss, whether total or not, is to be determined just as if there was no policy at all; and the established mode of putting the question, when it is alleged that there has been, what is perhaps improperly called, a constructive total loss of a ship, is to consider the policy altogether out of the question, and to inquire what a prudent uninsured owner would have done in the state in which the vessel was placed by the perils insured against. If he would not have repaired the vessel, it is deemed to be lost. When this test has been applied, and the nature of the loss has been thus determined, the quantum of compensation is then to be fixed. In an open policy the compensation must be then ascertained by evidence. In a valued one, the agreed total value is conclusive: each party has conclusively admitted that this fixed sum shall be that which the assured

is entitled to receive in case of a total loss. It is argued that this course of proceeding infringes on the generally received rule, that an insurance is a mere contract of indemnity, for thus the assured may obtain more than a compensation for his loss; and it is so. A policy of assurance is not a perfect contract of indemnity. It must be taken with this qualification, that the parties may agree beforehand in estimating the value of the subject assured, by way of liquidated damages, as indeed they may in any other contract to indemnify."

This opinion was accepted by the House of Lords as a correct statement of the law. Two points were, therefore, decided: first, that the value in the policy is not conclusive for all purposes, but is conclusive for the purpose of ascertaining the compensation to be paid to the assured when a loss has happened; and, secondly, that a valued policy of insurance is a contract of indemnity, with this qualification, that the amount recoverable is ascertained beforehand by way of liquidated damages.

It is not to be inferred that the rule thus established is to be applied only for the purpose of ascertaining the amount to be paid to the assured, as is shewn by *Muirhead* v. *Forth and North Sea Mutual Insurance Association*. (1) There a policy contained a clause making it a condition that the assured should keep one-fifth of the value of the ship uninsured. The policy value of the ship was 3750*l.*; insurances were effected to the amount of 4000*l.*, and it was contended that there was no breach of the condition because the real value was 5000*l.*; but Lord Herschell said: "It is clear that as between the parties to this action" (namely, the assured and underwriters) "the value of the vessel must be taken as 3750*l.*; and if she was insured for more than four-fifths of 3750*l.* it appears to me that this condition was broken." This rule, as is shewn by the opinion of the judges in *Irving* v. *Manning* (2), extends to cases of partial as well as total loss; but is much less easy of application. As regards goods and freight, the rule appears to be that established in *Lewis* v. *Rucker* (3), namely, that the

(1) [1894] A. C. 72. (2) 1 H. L. C. 287.
(3) 2 Burr. 1167.

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assurer pays such proportion of the value stated in the policy as the amount of damage done bears to the total actual value, such damage and actual value being both ascertained with reference to the same time and place. It was said in argument on behalf of the defendants that this rule was introduced to avoid charging the underwriter with fluctuation in the market value of the goods. This is the reason for that part of the rule which requires that the proportion between the damage and actual value shall be ascertained with reference to the same time and place; but after this proportion has been got, the rule requires (as in the case of a total loss) that the amount of compensation shall be assessed with reference to the value stated in the policy; and this is pointed out by Lord Mansfield in the case cited. In commenting on the same case in *Irving* v. *Manning* (1) Patteson J. says: "the extent and nature of the loss being ascertained by this comparison, the underwriter was held liable to pay the proportion so ascertained of the value in the policy; and this mode of treating partial losses on goods is always adhered to." Where, however, a ship is damaged without becoming a total loss, then, if the vessel is repaired, the rule is that the damage is to be taken as the cost of repairs, less one-third, and the amount recoverable under a valued policy is the same aliquot part of the sum insured as the amount of damage is of the valuation in the policy; so that where the sum insured is the full value stated, the assured recovers the whole of the repairs: see Arnould, 5th ed. p. 901; 7th ed. p. 1155 (the leading passages in which are quoted with approval by Lord Esher in *Pitman* v. *Universal Marine Association* (2)); Phillips on Insurance, § 1435.

It is contended that the rule as to repairs ought to be applied in the present case. In my opinion, however, this does not follow. The cost of repairs has no necessary relation to the value of the ship; whereas the amount here sued for is a sum apportioned by the average adjuster to the ship by a calculation into which the value of the ship directly enters as an important element. If, indeed, the shipowners were entitled to recover against the underwriters the whole of the average loss

(1) 1 H. L. C. 287.

(2) 9 Q. B. D. at p. 209.

and the salvage award, the underwriters being subrogated into their rights of contribution against the owners of freight and cargo, as was held in *Dickenson* v. *Jardine* (1) with respect to goods jettisoned, there would be what seems at least a plausible argument in support of the plaintiffs' contention; but the judgment of Gorell Barnes J. in *The Mary Thomas* (2) negatives such a right as regards the average loss; and the learned counsel for the plaintiffs admitted in argument that the shipowner could only sue for the ship's share of the salvage award. This being so, I think that in assessing the amount of compensation to be paid by the underwriters that amount must be determined by reference to the policy value.

The question then arises, What sum ought the plaintiffs to recover? Theoretically, I think the sum would be that which would be payable if the value of 33,000*l.* had been employed in the average adjustment instead of 40,000*l.*, or possibly if the adjustment be based on the value of the ship as saved to the proportion of 33,000*l.* which the saved value bears to the sound value at the same time and place. To this there are two objections: first, that the ascertainment of this sum would, or at all events might, involve a computation of greater or less complexity, and the trouble of a reference back to the average adjuster; and, secondly, that it is contrary to a long-established practice to which effect has been given by Bigham J. This practice is not contrary to any rule of law, and in the circumstances ought, I think, to be followed. At the same time, it seems to me that when the policy value exceeds that adopted by the average adjuster the like regard ought to be paid to it; for I think that to hold otherwise would be contrary to *Irving* v. *Manning* (3) and the cases which have followed it, according to which the policy value is to be regarded whether it exceeds or falls short of the true value.

I have only to add, with reference to the decision in the American Courts which was referred to in argument, that it was to a large extent based on the practice of average adjusters in the State of New York, which is different from that which

(1) L. R. 3 C. P. 639. (2) [1894] P. 108, at p. 117.
(3) 1 H. L. C. 287.

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prevails in England. So far as this ratio decidendi extends, that case supports the view taken by Bigham J. I think that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

W. J. B.

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MARITIME INSURANCE COMPANY *v.* STEARNS.

Insurance, Marine—Reinsurance—Insurance on Goods—Unreasonable Delay of Voyage—Material Alteration of Risk.

The plaintiffs, who had insured all shipments of coal by certain merchants for twelve months by a cover-note at premiums varying according to the date of sailing and port of destination, on July 30 received notice from the merchants of a proposed shipment by a certain vessel from the Tyne. The premiums payable to the plaintiffs would be 12*s.* 9*d.* for August, and 15*s.* for September. On August 2 they effected a reinsurance for 1500*l.* at a premium of 6*s.* 8*d.* with the defendant and others at Lloyd's, by a slip which named the vessel and purported to be subject to the reinsurance and deviation clauses. The vessel was then, as the underwriters ascertained, near the Tyne, but she did not sail on the proposed voyage until September 25, and was lost on October 2. The policy of reinsurance was issued on October 5, and the plaintiffs, having paid the merchants for a total loss, claimed payment from the defendant:—

Held, that the risk was materially altered by the delay of the voyage, and that the underwriters were not liable.

COMMERCIAL CAUSE tried before Mathew J. without a jury.

The plaintiffs, on May 11, 1900, issued an open cover to Pyman & Co. for twelve months, to cover all shipments of coal by steamer at and from ports on the east coast to ports in Sweden, Norway, and the Baltic. The premiums for each shipment were to be paid according to a schedule of rates varying according to the date of the bill of lading and port of destination, the premiums for Lulea being 12*s.* 9*d.* from April 1 to August 31, and 15*s.* from September 1 to September 30. Risks were to be reported provisionally by Pyman & Co. to the plaintiffs' agent as soon as possible after the chartering of

each vessel, and the insurance to be closed by them immediately on receipt of shipping documents.

Pyman & Co., on July 28, 1900, chartered the steamer *Brenttor* to carry a cargo of coal from Blyth to Lulea, and on July 30 gave provisional notice thereof to the plaintiffs without stating any amount of valuation. The plaintiffs on August 1 instructed brokers to effect a reinsurance for 1500*l.* upon coal by the *Brenttor* from Blyth to Lulea at 6*s.* 8*d.* premium, and the brokers prepared a slip, containing the above particulars and the reinsurance and deviation clauses, which was submitted to the defendant's representative and initialled by him on August 2, he having ascertained that the ship was then on the north-east coast.

The *Brenttor* sailed on August 11 from Blyth with a cargo of coal for Cronstadt, but not for Pyman & Co., and from Cronstadt she proceeded to Lulea, arriving there on August 29. She arrived back at Blyth on September 20, and loaded a cargo of coal for Pyman & Co., and the bills of lading were signed and the ship sailed for Lulea on September 25. On the same day Pyman & Co. gave the plaintiffs instructions to close the insurance for 2600*l.*, and on September 26 they issued to Pyman & Co. two policies for 2600*l.* upon coals so valued by the *Brenttor* from Blyth to Lulea at a premium of 15*s.* On October 2 the plaintiffs instructed their brokers to put forward the policies under the reinsurance for 1500*l.*, and on October 5 the brokers put forward a policy for 1270*l.* (the balance being underwritten by a company), upon coal "valued as per original policy or policies," for signature by the defendant's representative. The premium was 6*s.* 8*d.* The policy contained the following clauses: "being a reinsurance of policy or policies of the Maritime Insurance Company, and subject to the same terms, conditions, and clauses as original policy or policies, and to pay as may be paid thereon"; "in the event of any deviation or change of voyage, it is hereby agreed to hold the assured covered at a premium to be arranged." The policy was signed by the defendant's representative, who then knew that the *Brenttor* had sailed from Blyth on August 11, and had arrived at Lulea on August 29.

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The plaintiffs had a standing reinsurance cover with certain underwriters for any excess over 1500*l.* in respect of risks of this kind, and had on October 2 declared 1100*l.* to them in respect of this cargo of coal.

The *Brenttor*, while on the voyage to Lulea, was wrecked on October 2 and became a total loss. The plaintiffs paid Pyman & Co. for a total loss, and claimed payment from the defendant upon the reinsurance policy. The defendant refused to pay upon the ground that the vessel had in August made the voyage which was reinsured, and this action was brought. The defendant contended that it was an implied condition of his contract that the insured voyage should begin within a reasonable time after August 2; that the delay until September 25 was a material alteration in the risk; and that there had been concealment of the material fact that the insured voyage would not, or might not, begin until September 25.

Joseph Walton, K.C., and *Simey*, for the plaintiffs. This is a reinsurance, and by the reinsurance clause all the ordinary clauses in the original policy are incorporated, and the underwriters are bound thereby: *Joyce* v. *Realm Marine Insurance Co.* (1) Under the original insurance the voyage might commence at any time after the provisional report of the risk. This being a reinsurance, the underwriters cannot say that there was a concealment of anything which they could have learnt by inquiring as to, or seeing, the original insurance: *Charlesworth* v. *Faber.* (2) The clause in the original policy as to deviation or change of voyage is incorporated into the reinsurance, and, therefore, the underwriters can at most claim to have an adjustment of the premium under that clause.

J. A. Hamilton, K.C., and *F. D. Mackinnon*, for the defendant. It is an implied condition in a voyage policy that the voyage shall begin within a reasonable time, and the delay in this case was unreasonable: *De Wolf* v. *Archangel Insurance Co.* (3) The date of sailing was most material to the risk, and the risk was most materially altered by the delay in sailing:

(1) (1872) L. R. 7 Q. B. 580. (2) (1900) 5 Com. Cas. 408.
(3) (1874) L. R. 9 Q. B. 451.

Hull v. *Cooper*. (1) The underwriter is under no obligation to inquire as to the time of sailing. This was not the voyage covered by the policy, and the risk never attached; therefore the clause relating to deviation or change of voyage can have no application: *Simon, Israel & Co.* v. *Sedgwick*. (2) There was not, in fact, any deviation or change of voyage; the voyage was the same, but was unreasonably delayed.

Joseph Walton, K.C., replied.

Cur. adv. vult.

June 17. MATHEW J. This is an action against an underwriter at Lloyd's upon a policy of reinsurance of a policy on a cargo of coal from the river Tyne to a port called Lulea. The original insurance was by a cover-note issued by the plaintiffs to Pyman & Co., which was intended to continue for a year, and was for the insurance of shipments of coals from a good port on the east coast of Great Britain to a good port in Sweden, Norway, Denmark, or Baltic ports of Germany; the rate of premium was fixed according to the date of the bill of lading; and the risks were to be reported provisionally to the plaintiffs' agent as soon as possible after the chartering of each vessel, and definite insurance to be closed with him immediately on receipt of shipping documents. Annexed to that cover-note there was a scale of premiums varying with the date of sailing and the port of destination, and the premiums in respect of shipments to the port of Lulea were to be 12*s.* 9*d.* from April 1 to August 31, and 15*s.* from September 1 to September 30. A declaration was made by Pyman & Co. on that cover-note on July 30, 1900, for a cargo from the Tyne by the *Brenttor*. On receipt of that declaration the plaintiffs gave instructions to reinsure a part of the amount by an insurance at Lloyd's; and, accordingly, the plaintiffs' agent prepared a slip and submitted it to the underwriters at Lloyd's. It was a slip in the ordinary form, describing the voyage and containing the usual particulars in respect of a specific insurance for 1500*l.* on a cargo for the voyage mentioned. The underwriters ascertained that the vessel was then

(1) (1811) 14 East, 479; 13 R. R. 287. (2) [1893] 1 Q. B. 303.

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in the neighbourhood of the Tyne. The premium offered on the slip was 6*s.* 8*d.*, the very lowest figure for a summer risk, and the underwriters were induced to accept the insurance upon that slip, believing that the ship was then about to load for Lulea. The vessel did load a few days after the slip was initialled, but she sailed for Constadt, and not for Lulea, upon a voyage not intended to be covered by this reinsurance and with a cargo for another shipper. The vessel then went to Lulea, returned to the Tyne, and loaded a cargo of coal for Pyman & Co., and sailed for Lulea on September 25. The slip was dated August 2, and the plaintiffs alleged that the vessel sailed with the cargo, which was reinsured, upon September 25. The vessel was lost early in October, and in the usual way a reinsurance policy was issued on the application of the plaintiffs upon which this demand was made for payment. The defendant at once objected that he was not liable, because the vessel had not sailed in proper time. The only witness called for the plaintiffs was their agent. He explained that their course of business was that there was a standing reinsurance of any risk over 1500*l.*, which was the risk which the plaintiffs ran in respect of any specific insurance; in this case, however, they reinsured the whole amount, the reason given being that they did not like the risk to Lulea at any time of the year. He said that he could not tell what impression would be produced upon the mind of an underwriter by a slip with an offer on August 2 of a premium of 6*s.* 8*d.*; he said that the underwriter ought to have known as much about the matter as he did, and that he accepted 6*s.* 8*d.*, and ought to have asked for more if he wanted it. On behalf of the defendant it was proved by Mr. Sicklemore, who had represented the underwriters, that when he had ascertained where the ship was he had come to the conclusion that the voyage was one which would be commenced within a short time after the slip had been signed, and that when he afterwards saw that the vessel had gone to Lulea in August he believed the risk was at an end, and, therefore, entirely repudiated this claim. His evidence was that the risk was a different one, and the rate of premium would have been higher, and that the underwriters might very well object to take the

risk to this port after the summer season, which ended at the end of August. His evidence was supported by other witnesses; and really in the end it was not denied that this risk was not the risk which the underwriter would assume to be intended when the slip was put before him. But it was argued for the plaintiffs that, although there may have been delay of the voyage, the defendant was nevertheless on the risk. It was said that this was a reinsurance, and a reinsurance on the terms of the original insurance; that the terms of the original insurance could only be gathered from the cover-slip, and that the defendant ought to have asked to see it; that, if he had seen it, he would have ascertained that this slip covered insurance for the whole of the year, and that, therefore, the shipment might take place in any month and he would be liable in respect of that shipment. When it was pointed out that the premium to be paid to the defendant was 6*s.* 8*d.*, and that the premiums provided for by the cover-slip began at 12*s.* 6*d.* and increased as the winter came on, it was said for the plaintiffs that a proportionate increase might be made in the amount of the premium, and that in that way all the documents might be construed as one document and the liability of the defendant established. I cannot for a moment accept that argument. The defendant was not entitled to see the cover-slip, which would have shewn that the plaintiffs were charging a premium which was nearly twice the amount offered to the underwriters. The underwriters would expect only a policy of insurance in the ordinary form, covering the risk reinsured. The policy of insurance was in fact issued in the ordinary course after the vessel had sailed, and could give the defendant no information whatever except as to the premium charged by that policy.

Then, in the policy which was issued in accordance with the cover-note, there was the usual clause that "in the event of the vessel making any deviation or change of voyage it is mutually agreed that such deviation shall be held covered at a premium to be arranged, provided that due notice is given by the assured on receipt of advice of such deviation or change of voyage." It was argued for the plaintiffs that this was a

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Mathew J.

change of voyage, and that, therefore, there ought to be an arrangement with reference to premium, that the arrangement can be made at any time, and, subject to that arrangement, the policy is binding on the defendant. I am clearly of opinion that this clause has no such operation. The deviation contemplated is clearly a deviation in the course of the voyage. The words "deviation or change of voyage" clearly mean, inasmuch as the port of loading and departure is fixed, alteration in the port of arrival. In that case I agree that the clause might apply, but it has no operation here because there was no change of voyage. The voyage was the same, but it was unreasonably postponed. The plaintiffs had to admit that, upon their argument, the vessel need not sail until December or January, and to contend that then the risk might be treated as subject only to a trifling alteration in the amount of the premium. I decide against the plaintiffs upon that point as well as upon the other points, and I give judgment for the defendant.

Judgment for the defendant.

Solicitors for plaintiffs: *Field, Roscoe & Co., for Batesons, Liverpool.*

Solicitors for defendant: *Thomas Cooper & Co.*

P. B. H.

[IN THE COMMERCIAL COURT.]

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July 11, 15.

ROBINSON GOLD MINING COMPANY AND OTHERS *v.* ALLIANCE INSURANCE COMPANY.

Insurance (Marine)—Policy—Property of Alien Enemy—Loss before Commencement of War—Seizure by Enemy's Government of Property of its own Subject—Warranty against "Capture, Seizure, or Detention."

Gold, the property of a mining company, which was incorporated and registered under the laws of the South African Republic and carried on its business there, was insured with the defendants against (amongst other risks) "arrests, restraints, and detainments of all kings, princes, and people" during transit from the mines in the South African Republic to the United Kingdom or France; the policy contained a warranty against "capture, seizure, and detention, and the consequences thereof." During transit the gold was taken possession of by the Government of the South African Republic on its own territory. The gold was taken in anticipation of an outbreak of war, which in fact occurred a few days afterwards, and the act of the Government in taking it was constitutional and in accordance with the law of the Republic. In an action against the underwriters:—

Held, that there had been a seizure or detention of the gold within the meaning of the warranty, and that the underwriters were therefore not liable on the policy.

ACTION on a policy of insurance on gold, tried in the Commercial Court before Phillimore J. The following facts appeared on the pleadings and admissions.

The plaintiffs were a number of gold mining companies owning property and carrying on business in the territory of the South African Republic, and were interested in a policy of assurance effected with the defendants at a premium of 2*s.* 6*d.* per cent. upon gold to be declared at and from the different mines to Europe up to a total amount of 500,000*l.* The subject-matter of the insurance was described as gold "at and from the mine or mines situated in the Witwatersrand Goldfields District as enumerated below, either direct or viâ any bank or banks, whether in charge of the assured or their employees or otherwise, to the railway station in Johannesburg, and then by rail to Port Elizabeth or Cape Town, and thence by steamer as below to destination in the United Kingdom and or

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France, including risk of craft and all land conveyance from despatch until delivered to addressees." The insurance covered all ordinary perils, and included "arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever." The policy contained the following condition: "Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war."

On October 2, 1899, consignments of gold to which the policy attached, and amounting in value to 221,950*l.*, were despatched by rail from Johannesburg to Cape Town en route for London. Upon reaching on the same day Vereeniging, a frontier station in the territory of the South African Republic, the gold was removed from the train and was taken in charge by the resident justice, an official of the South African Republic, who was acting in pursuance of instructions sent to him by the Attorney-General on behalf of the executive Government of the Republic. On October 9, 1899, gold of the value of 11,800*l.*, to which the policy attached, and which while in transit from the mines to the coast had been deposited by the plaintiffs in a bank at Johannesburg, was seized at the bank by the authority of the executive Government, who prevented its being sent out of the country. None of the gold was ever returned to the plaintiffs. On October 11, 1899, war was declared by the South African Republic against Great Britain.

The defendants pleaded that the warranty freed them from liability for the losses; that the losses were not by any peril insured against; and also that the plaintiffs' claim was contrary to public policy, following on the latter point the language of the defence in *Driefontein Consolidated Gold Mines* v. *Janson*. (1)

Evidence was called on behalf of the plaintiffs to the effect that the gold was lawfully taken under powers conferred upon the executive Government over both the persons and property of its subjects where war had actually broken out or was apprehended; that the commandos had previously been called out for

(1) Ante, p. 419.

the defence of the country against an apprehended invasion, and that under those circumstances the executive council could lawfully requisition the gold and all other property of the inhabitants for the purpose for which the commandos had been called out. No evidence was called on behalf of the defendants.

Lawson Walton, K.C., and *J. A. Hamilton, K.C.* (*Campbell-Johnston* with them), for the plaintiffs. The loss was within the perils insured against. It is within the expression "arrests, restraints, and detainments," which has been held to apply to the seizure of a ship in consequence of an embargo laid on her by the sovereign of the country of the assured for the purpose of carrying on war with another Power: *Aubert* v. *Gray* (1); *Rotch* v. *Edie* (2); there was here clearly an arrest and detainment of the gold by the Government of the South African Republic. The warranty must be construed as a whole, and as confined to risks arising owing to operations, external or internal, actual or apprehended, directed against the South African Republic. The expression "warlike operations before declaration of war" is not appropriate to describe a risk arising from the act of the sovereign power of the State of which the assured was a citizen. Assuming, however, that the warranty is wide enough otherwise to include such a case as the present, the loss was not a loss by capture, seizure, or detention within the meaning of the warranty. Capture obviously means belligerent capture, and is not an apt word to describe such an act as that of the Government of the South African Republic in dealing with this gold. Neither is it seizure, which means forcible seizure. The decided cases shew that in "seizure" there must be an element of physical force, whether that force be a mere act of violence or an application of legal force for the punishment of an illegal act. For example, seizure includes the case of a ship forcibly taken possession of by a foreign government in order to her condemnation for smuggling: *Cory* v. *Burr* (3); a ship seized by an act of piracy: *Kleinwort* v. *Shepard*. (4) The same

(1) (1861) 3 B. & S. 163.
(2) (1795) 6 T. R. 413; 3 R. R. 222.
(3) (1883) 8 App. Cas. 393.
(4) (1859) 1 E. & E. 447.

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conclusion is derived from a consideration of other cases where "seizure" is discussed: *Rodocanachi* v. *Elliott* (1); *Johnston* v. *Hogg* (2); *Powell* v. *Hyde*. (3) "Seizure" has never been held to be applicable to the peaceful surrender by the owner of property demanded from him by the State. Nor is the case one of detention; it was merely an appropriation of property for State purposes.

[They also cited *Conway* v. *Gray* (4); *Palmer* v. *Naylor* (5); *Greene* v. *Pacific Mutual Insurance Co.* (6); *Brunner* v. *Webster* (7); *Kidston* v. *Empire Assurance Co.* (8); Phillips on Insurance, ss. 1108, 1109, 1111.]

Joseph Walton, K.C. (*Lord Robert Cecil, K.C.*, and *Loehnis* with him), for the defendants. The facts bring the case within the warranty. There is no authority for limiting the operation of the warranty to belligerent risks, or to penal seizure or detention. If the language of such a warranty extends to a penal taking, as it was held to do in *Cory* v. *Burr* (9), it ought equally to extend to a case like the present, where the taking of the goods was not for the ordinary fiscal purposes of the Transvaal Government, but for the exceptional necessities of the country. It is clear from the evidence that the Transvaal Government had before the seizure of the gold put their forces into the field in anticipation of war breaking out immediately, which makes the case stronger than that of *Driefontein Consolidated Gold Mines* v. *Janson* (10), where it was contended that there was no evidence that the gold had been seized in anticipation of war. If the facts do not bring the case within the warranty, neither does the loss come within the perils insured against.

July 15. The following written judgment was read by

PHILLIMORE J. This case is important by reason of the large sum at stake. It is remarkable in its features, and still

(1) (1873) L. R. 8 C. P. 649.
(2) (1883) 10 Q. B. D. 432.
(3) (1855) 5 E. & B. 607.
(4) (1809) 10 East, 536.
(5) (1854) 10 Ex. 382.
(6) (1864) 9 Allen (Mass.) 217.
(7) (1900) 5 Com. Cas. 167.
(8) (1866) L. R. 1 C. P. 546.
(9) 8 App. Cas. 393.
(10) Ante, p. 419.

more remarkable from the position and juxtaposition of the two witnesses who have given evidence. But the circumstances are so peculiar that it is not likely to give rise to any guiding rules of general importance. I am about to decide it as a question of construction.

The plaintiffs, who are several mining companies incorporated according to the laws of the then existing South African Republic, and therefore to be deemed subjects and citizens of that Republic, sue upon a policy of insurance on gold in transit from the mines to a bank at Johannesburg, at the bank, and thence by land and sea conveyance to France or England, and they declare upon two losses, one on October 2, 1899, at Vereeniging, a frontier railway station of the then Republic, the other at Johannesburg, also in the Republic, on October 9, and they aver that these losses were caused by perils insured against, to wit, "arrests, restraints, and detainments of kings, princes, and people." These perils are in the policy. The defendants, while denying that the losses were by perils insured against, also rely upon a clause of exception, which is in these words: "Warranted free of capture, seizure, and detention, and the consequences thereof or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war."

I have no doubt that the gold was in each case forcibly taken by officers of the South African Republic within the territory of the South African Republic from the custodians of the gold who were carrying it or holding it for the plaintiff companies. The actual officials or servants of the plaintiff companies were not present; but if they had been they could not have effectually resisted. As it was, the custodians submitted without resistance. At this time war had not broken out; it did not break out till October 11; nor had martial law been proclaimed. But commandos had been called out; and the Volksraad had passed a resolution, which had the force of law, vesting the legislative power for the time in the executive. I have further no doubt that the gold was legally seized according to the laws

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in force in the South African Republic; I shall perhaps best explain my meaning by saying that it was constitutionally seized. The evidence of the two witnesses satisfied me that when once a commando was in the field it was in the power of the executive Government to seize any chattels which it might deem necessary to be seized for the purposes of the war, and that for this purpose it had a discretion which could not be inquired into or traversed. This power might be, and may have been, capriciously and arbitrarily exercised; and the fact that except in the cases of cattle and wagons no compensation was given, and the only recompense offered to the sufferer was a share in possible booty, made it a crude and harsh law. But the circumstances of the South African Republic, beginning its history with most of its frontiers exposed to sudden incursions of savage tribes, made it not unnatural. The Romans, the fathers of all Western law, had a not dissimilar provision in the case of a tumultus Gallicus. Our own law contains cases where entry upon a subject's lands was held justified by the necessity of making ramparts against an invading enemy, and other cases are to be found cited in the report of *Rex* v. *Hampden* (1) (the case of ship-money) and elsewhere. International law recognises this right flagrante bello even as exercised against the citizens of a neutral State. This is the jus angariæ, which will be found treated of in Sir R. Phillimore's Commentaries on International Law, vol. iii. §§ xxix.–xxxi., and by other authors. But it is unnecessary to inquire whether this law be natural and reasonable according to precedent or not. I am satisfied that it existed, and upon the whole I think that the taking was made under it. It is true that originally there were two motives for the taking, and that one of them was to keep the revenues of this country from going away, not to appropriate for commando purposes; but the other motive was also present; and the subsequent acts of the executive in confiscating, in a literal sense, this gold may be deemed to relate back and to cover the taking. Moreover, the former motive might perhaps afford a good cause under the

(1) (1637) 3 State Trials, at pp. 903–5.

principles of law applicable to all nations in case of emergency, which are well laid down in the American case of *Mitchell* v. *Harmony*. (1)

This brings us to the two questions: Was the taking of this gold an arrest, restraint, or detainment of rulers? If so, was it also a capture, seizure, or detention, or a consequence of warlike operations?

I am in some doubt upon the first point. Restraint of princes and rulers is more often exercised by a government against the citizens of another State. It generally arises in a war, or at least as an act of retorsion, such as embargo or blockade. It is not restraint of princes when a ship or cargo is arrested by civil process at the suit of a subject. This was decided upon the construction of a bill of lading in *Crew, Widgery & Co.* v. *Great Western Steamship Co.* (2) On the other hand, the case of *Aubert* v. *Gray* (3) decided that when the Queen of Spain took within her own territory a vessel belonging to her own subjects for military purposes in a war against Morocco, the loss by this taking was a loss by restraint of princes; and that case would look very like the present one, if it were not for a reservation in the judgment. Phillips on Insurance, s. 1109, says that "the policy extends to captures, arrests, and detentions . . . . by the Government of which the assured is a subject, for any cause other than a violation of law, as the taking of a vessel by Government to be used as a fire-ship." Arnould on Marine Insurance, p. 946 (7th ed.), speaks to the same effect. I do not propose to decide this point at present; and I pass on to the next question.

Was this taking a capture, seizure, or detention within the terms of the clause of exception? It has been suggested that these words point to hostile taking, and to hostile taking only. That is probably true of capture. But seizure is an additional word. It means more than capture, and in good sense and according to the precedents it should cover this case. So I think of detention. It has been contended that seizure implies force; so it does, and, as I have said, I think there was force.

(1) (1851) 13 Howard, U.S. 115, at p. 134.

(2) (1887) 3 Times L. R. 394, 738.

(3) 3 B. & S. 163.

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It has been further contended alternatively (1.) that force excludes law; (2.) that at any rate seizure is not where the taking is by lawful force. The first proposition seems to me radically unsound. I can perhaps dispose of it by a single citation from the decision of Sir W. Scott (afterwards Lord Stowell) in the case of *The Maria*. (1) "It is wild conceit that wherever force is used, it may be forcibly resisted; a lawful force cannot lawfully be resisted. The only case where it can be so in matters of this nature is in the state of war and conflict between two countries, where one party has a perfect right to attack by force and the other has an equally perfect right to repel by force."

As to the second proposition, it is in conflict with the decided cases. "Seizure" signifies "the taking of a ship by the act of governments or other public authority for a violation of the laws of trade, or some rule or regulation instituted as a matter of municipal police, or in consequence of an existing state of war." This is the language of Bigelow C.J. in *Greene* v. *Pacific Mutual Insurance Co.* (2) In *Cory* v. *Burr* (3) the seizure was not, as it was at first contended before me, an act of mere force; it was a legal seizure. This was substantially admitted throughout the course of that case; and is clearly pointed out by Lord Blackburn in the House of Lords. In fact, the doubt among lawyers at one time was whether an unlawful taking was a seizure. This doubt gave rise to the arguments in *Kleinwort* v. *Shepard* (4) and *Johnston* v. *Hogg*. (5) The cases I have cited further shew that seizure is not confined to hostile acts. Nor is the word "detention." Phillips, in the passage cited by me, puts detention with captures and arrests as a peril insured against by the ordinary words of a policy, and enumerates among the causes of detention acts of the home Government. In fact, when we come to look at the words enumerating the loss side by side with the words of exception, it is pretty clear that in some cases the words of exception, though written in different language, do

(1) (1799) 1 C. Rob. 340, at p. 360.
(2) 9 Allen (Mass.) 217.
(3) 8 App. Cas. 393.
(4) 1 E. & E. 447.
(5) 10 Q. B. D. 432.

not merely qualify but delete some of the words of enumeration. The language of the body of the policy, as I was reminded, is ancient, that of the exception comparatively modern. But "takings at sea" must be eliminated by the exception of "capture," "detainment of princes" by "detention." Phillips heads the section of his work devoted to this class of perils insured against, not "arrest, restraint, and detainment of princes," but "captures, arrests, restraints, and detentions." The argument may be put this way: there is no arrest or restraint of princes except by capture, seizure, or detention; the most outlying case of restraint of princes, *Rodocanachi* v. *Elliott* (1), being a case of detention. In other words, if the risk is one covered in the body of the policy, it is necessarily excluded by the clause of exception—a clause which probably excludes this risk and some others.

I have not thought it necessary to dwell upon the words "consequence of warlike operations before declaration of war"; it is not necessary. But I am not sure that in this very peculiar case these words would not also apply.

Lastly, it has been suggested that here there has been no seizure, because the subject must be deemed to have acquiesced and perhaps even agreed in accordance with his duty to the appropriation of his goods. This argument pushed to the extreme would make the assured cause his own loss; pushed not so far, it makes this taking a kind of irregular taxation, and then there would be no more a loss by restraint of princes than there would be if the ship were sold under a levy for taxes. I do not take this view of the facts. To my mind the very singular facts of this case are more like those suggested in *Mitchell* v. *Harmony* (2), to which I have already referred. But if I did take this view, I should say there was no loss by perils insured against.

Another defence is raised by paragraphs 4, 5, and 6 of the defence. A similar defence has been disallowed by the majority of the Court of Appeal, affirming Mathew J., in the case of *Driefontein Consolidated Mines, Limited* v. *Janson*. (3) I

(1) L. R. 8 C. P. 649. (2) 13 Howard, U.S. 115.
(3) Ante, p. 419.

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understand that that case is on the way to the House of Lords, but at present I am bound by the decision of the Court of Appeal. This case is not the same case, and I am by no means sure that the facts which the plaintiff has had to prove to launch this case do not conclude some of the doubts which weighed with the majority of the Court of Appeal, and prove some steps in the defendants' argument, which were at that time and in that case unproved. But I have not gone sufficiently deeply into the former case to be sure of this; and it is not necessary to do so, as on other grounds my judgment must be for the defendants.

Judgment for the defendants.

Solicitors for plaintiffs: *Ingle, Holmes & Sons.*

Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

W. J. B.

END OF VOL. II.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1901, will be as follows :—

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[1901] 1 Ch. [1901] 2 Ch.

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ACCORD AND SATISFACTION—*Judgment Debt—Joint and Several Debt—Receipt—Release to one Co-debtor—Extinguishment of Debt—Construction of Release — Intention — Surrounding Circumstances.*

A. and B. became liable on a "joint and several" guarantee to a bank for a sum of 6000*l.* owing to the bank from a company. Subsequently the bank obtained judgment for that sum against A. and B. "jointly and severally." The judgment not being satisfied, the bank presented a bankruptcy petition against B. alone for the whole judgment debt, but the petition was withdrawn upon terms arranged between B. and the bank and embodied in a receipt given to B. by the bank for 3000*l.* partly in cash and partly in bills paid and given by B. "in full discharge of all claims by the bank against B. in connection with the company and all guarantees given by him to the bank in connection with that company, and in settlement of any outstanding questions as to the amount due to the bank." The bank then presented a bankruptcy petition against A. alone for 3000*l.*, the alleged "balance" of the judgment debt of 6000*l.* :—

Held, by Rigby and Collins L.JJ. (Romer L.J. doubting), that the receipt amounted to an accord and satisfaction equivalent to a release of B. from the entire joint and several judgment debt, there being no surrounding circumstances qualifying its effect as an absolute release in terms, and consequently that by reason of the release of A.'s co-debtor there was no debt to support bankruptcy proceedings against A.

Ex parte Good, In re Armitage, (1877) 5 Ch. D. 46, distinguished.

The rule of law that the release of one of two joint debtors under a joint and several obligation operates as a release of the other applies as much to a judgment debt as to any other obligation. *In re* E. W. A., A DEBTOR - - C. A. 642

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Beer, with which a certain quantity of arsenic injurious to health had been mixed in the process of manufacture accidentally and in ignorance, was sold by a retailer without knowledge or reasonable grounds for suspicion of the presence of the arsenic in the beer :—

Held, that there was evidence that the beer was not of the nature, substance, and quality of the article demanded by the purchaser, and that the retailer could be convicted under s. 6 of the Sale of Food and Drugs Act, 1875.

Certificates of public analyst stating in one case that the sample of beer "contains arsenic," and in the other case that it "contains a serious quantity of arsenic," held to be insufficient. GOULDER *v.* ROOK. BENT *v.* ORMEROD. LEE *v.* BENT. BARLOW *v.* NOBLETT - Div. Ct. 290

2. —— *Butter—Process of mixing Milk with Butter—Increased Percentage of Water—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 6.

In the ordinary process of making butter a large proportion of the water in the milk or cream from which it is made is eliminated. The appellants, after butter had been made in the ordinary way, mixed milk with it, for the purpose

ADULTERATION—*continued.*
of increasing its weight, by a process which had the effect of retaining the water in the milk, and causing an excessive quantity of water in the butter so treated. They sold the butter so treated to a purchaser as butter:—
Held, that they had committed the offence specified in s. 6 of the Sale of Food and Drugs Act, 1875, namely, selling to the prejudice of the purchaser an article of food not of the nature, substance, and quality of the article demanded by him. PEARKS, GUNSTON & TEE, LIMITED *v.* KNIGHT. THE SAME *v.* VAN TROMP **Div. Ct. 825**

3. —— *Certificate of Analysis, Sufficiency of—Insertion of Weight of Sample—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 18.
The insertion in the certificate given by a public analyst under the Sale of Food and Drugs Act, 1875, of the weight of the sample analyzed is obligatory only where the weight of the sample is material to the accuracy of the analysis, and its omission does not necessarily invalidate the certificate where the accuracy of the analysis does not in any way depend upon the weight of the sample. SNEATH *v.* TAYLOR - **Div. Ct. 376**

4. —— *Milk Prosecution—Defence—Written Warranty—Application of Warranty to Future Deliveries of Milk—Evidence—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 25.
In a prosecution under the Sale of Food and Drugs Act, 1875, for adulterating milk, where the defendant relies on s. 25 as a defence, it is sufficient if, in order to prove that he bought the milk in question with a written warranty, he prove that he had contracted with dairymen to supply him with milk daily; that they gave him a written warranty with respect to all milk which they should so supply, and that the milk in question was sold and supplied to him under that contract and warranty. He need not prove a specific written warranty with respect to each delivery; nor need there be evidence in writing to connect the milk in question with the warranty on which he relies.
Laidlaw v. *Wilson*, [1894] 1 Q. B. 74, followed.
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AFFILIATION PROCEEDINGS—Res judicata—Paternity of child—Judgment of quarter sessions—Action for seduction - **107**
See ESTOPPEL.

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ALEHOUSE ACT - - - - **157**
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ALIEN—Compensation for death—Negligence of British subject—Cause of action arising on high seas - - - **606**
See NEGLIGENCE. 1.

ANALYSIS—Certificate — Sufficiency—Insertion of weight of sample - - **376**
See ADULTERATION. 3.

ANALYST—Sufficiency of certificate of—Beer—Sale of food and drugs - - **290**
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ANCHOR—Policy — Collision between vessels, What is—Vessel riding at anchor—Collision with anchor - - **792**
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APPEAL—Costs, Security for—County court—Workmen's compensation - - **304**
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—— Receiving order—Stay of proceedings—"Creditors"—Service of notice of appeal **354**
See BANKRUPTCY. 4.

APPOINTMENT—Justices' clerk—Power to appoint—Payment of salary - **257**
See LOCAL GOVERNMENT.

—— Power of appointment—Stamp—Settlement—Exemption - - - **342**
See REVENUE. 9.

ARBITRATION—Costs of solicitor of umpire—Right to order for taxation—Third party - - - - **839**
See SOLICITOR.

—— Lands Clauses Acts—Rise in value of coal after notice to treat, whether arbitrator can consider in assessing compensation **798**
See LANDS CLAUSES ACTS. 1.

ARTIZANS' DWELLINGS — *Sanitation—House let in Lodgings or occupied by Members of more than one Family—Local Government—"House"—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 94.
A building which is divided into separate tenements which are let as artizans' dwellings is not a "house" within the meaning of s. 94 of the Public Health (London) Act, 1891, so as to enable the sanitary authority to make by-laws for its regulation. WEATHERITT *v.* CANTLAY **Div. Ct. 285**

ASSESSMENT—Corporation duty—Real property—"Annual value, income, or profits" **400**
See REVENUE. 1.

—— Poor-rate—Water from river, Right to take—Assessment of intake - - **620**
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—— Signal-box—Indirectly productive portion of railway - - - - **189**
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ASSIGN—Lease—Covenant not to assign—Lessee adjudicated bankrupt on his own petition—Forfeiture - - - **16**
See LANDLORD AND TENANT. 3.

ASSIGNMENT — *Debt — Same Debt assigned to different Persons—Priority—Notice to Debtor—Debt due to Firm—Assignment by One Partner by Deed—Validity.*

A debt due to a firm was assigned by one partner to the defendants by writing, and was subsequently assigned by the other partner to the plaintiff by deed. The plaintiff gave notice to the debtor before the defendants did so:—

Held, that there was a valid equitable assignment of the debt to the plaintiff, and that, having first given notice to the debtor, he was entitled to the debt in priority to the defendants. MARCHANT *v.* MORTON, DOWN & Co.

Channell J. 829

—— Contract to supply goods — Increase of burden by assignment - - 811
See CONTRACT. 1.

"**ASSIGNS**"—Will — Limitation — Heirs "and assigns" of survivor - - 745
See WILL.

ATTACHMENT—*Company — Garnishee Order—Money under Control of Public Official—Practice—Attachment of Debts—Inspector-General in Companies Liquidation—Share of Surplus Assets of Company in Liquidation—"Companies Liquidation Account"—"Debt"—Rules of Supreme Court, Order XLV., r. 1—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *ss.* 11, 15.

The proportion of the surplus assets of a company in liquidation belonging to a shareholder who could not be found was, in compliance with sub-s. 3 of s. 15 of the Companies (Winding-up) Act, 1890, paid by the liquidator to the "Companies Liquidation Account" with the Bank of England:—

Held, that the sum so paid in was not a "debt" due to the shareholder, and that it could not be attached by his judgment creditor by means of a garnishee order under Order XLV., r. 1, of the Rules of the Supreme Court.

Decision of Day J. reversed. SPENCE *v.* COLEMAN. INSPECTOR-GENERAL IN COMPANIES LIQUIDATION, GARNISHEE - - C. A. 199

AVERAGE—General—Sacrifice made on outward voyage of ship in ballast—Liability of chartered freight to contribute - 861
See SHIPPING. 2.

—— General—Salvage—Liability of underwriter
See INSURANCE, MARINE. 5. 896

BANKRUPTCY—*Disclaimer—"Unprofitable Contract"—Contract for Sale of Lease—Trustee—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 55.

The trustee in a bankruptcy cannot, under s. 55 of the Bankruptcy Act, 1883, disclaim a contract entered into by the bankrupt for the sale of a lease unless he also disclaims the lease itself.

Sect. 55 was intended to enable the trustee to get rid of an onerous property or contract, and it does not enable him to disclaim a contract merely because it would be more beneficial to the estate that the contract should not be carried out.

The trustee cannot by a disclaimer take away from a purchaser of land from the bankrupt the equitable interest which vested in him under his contract. *In re* BASTABLE. *Ex parte* THE TRUSTEE - - - - - C. A. 518

2. —— *Disclaimer of Lease by Trustee of Bankrupt Assignee—Mortgage by Sub-demise—Option to accept Vesting Order or to be excluded from Interest in Demised Property—Persons entitled to apply for Order—Application by Lessor—Persons to be served with Notice—Discretion of Court—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 55, *sub-s.* 6—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 13.

The lessee of a house assigned it, and the assignee again assigned it to a person who afterwards became bankrupt. Before the bankruptcy the bankrupt had mortgaged the house by sub-demise. The trustee in the bankruptcy disclaimed the lease:—

Held, that the lessor was entitled, without serving any one but the mortgagee, to apply, under s. 55, sub-s. 6, of the Bankruptcy Act, 1883, for an order putting the mortgagee to his election whether he would accept an order vesting the house in him, subject to the liabilities in respect of it to which at the date of the filing of the bankruptcy petition the bankrupt was subject under the lease, or to be excluded from all interest in and security upon the property.

In such a case the Court has a discretion as to the persons who are to be served with notice of the application.

But, if the lessee is not served, he is not prejudiced by the order, and it does not prevent him from afterwards applying for an order to vest the property in himself in case the underlessee does not accept a vesting order.

In re Cock, (1887) 20 Q. B. D. 343, *In re Finley*, (1888) 21 Q. B. D. 475, and *In re Morgan*, (1889) 22 Q. B. D. 592, discussed and followed. *In re* BAKER. *Ex parte* LUPTON - C. A. 628

3. —— *Lunatic Debtor—English Lunacy—Committee—Curator Bonis—Scottish Jurisdiction—Locus Standi—Bankruptcy Proceedings by Committee—Right to represent Lunatic—Lunacy Jurisdiction—Procedure—Consent of Court in Lunacy to Bankruptcy Proceedings—Directions, Summons for—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 148.

Where, in an English lunacy, a committee has been appointed, a curator bonis appointed by the Scottish Court of the lunatic's estates in Scotland (especially where appointed, prior to the lunacy, on account of physical incapacity) has no locus standi, under s. 148 of the Bankruptcy Act, 1883—which provides that, for the purposes of the Act, "a lunatic may act by his committee or curator bonis"—to intervene in English bankruptcy proceedings by the committee in the name and on behalf of the lunatic. The committee is, when appointed, the only person entitled under the section to represent the lunatic in the proceedings, and the curator bonis is only entitled to act therein for the lunatic where there is no committee.

Where the committee of a lunatic debtor has been authorized by the Court in Lunacy to take preliminary proceedings with a view to making him bankrupt, by filing in his name a declaration of insolvency, no subsequent steps, such as

BANKRUPTCY—*continued.*
admitting the debt of a creditor who may have presented the bankruptcy petition, or consenting to an adjudication, should be taken by the committee without first obtaining the sanction of the Court in Lunacy. *In re* R. S. A. - **C. A. 32**

4. —— *Practice—Receiving Order—Stay of Proceedings—Appeal—"Creditors"—Service of Notice of Appeal—"Parties directly affected by the Appeal"—Rules of Supreme Court*, 1883, *Order* LVIII., *r.* 2—*Bankruptcy Rules*, 1886, *r.* 134.

A receiving order having been made against a debtor upon a creditor's petition, the registrar, upon the application of the debtor supported by the majority of persons claiming to be creditors, including the petitioning creditor, stayed the issue of advertisements and all other proceedings under the receiving order for a limited period. The official receiver appealed against the stay, the debtor alone being served with notice of the appeal:—

Held, that notice of the appeal must be served also on the petitioning creditor as being a party "directly affected by the appeal" within Rules of the Supreme Court, 1883, Order LVIII., r. 2 (made applicable to bankruptcy appeals by rule 134 of the Bankruptcy Rules, 1886), but not on any other of the alleged creditors. *In re* A DEBTOR **C. A. 354**

5. —— *Receiving Order—Jurisdiction to Rescind—Abuse of Process of Court.*

A debtor, with the intention of evading committal orders made against him upon judgment summonses, presented his own bankruptcy petition, upon which a receiving order was made. He had previously at short intervals and with the same object presented two other bankruptcy petitions upon which receiving orders had been made, and was an undischarged bankrupt under three bankruptcies:—

Held, that the presentation of the petition by the debtor under such circumstances was an abuse of the process of the Court, and that the receiving order founded upon it must be rescinded.

Ex parte. Painter, In re Painter, [1895] 1 Q. B. 85, distinguished. *In re* BETTS. *Ex parte* OFFICIAL RECEIVER - - - **Div. Ct. 39**

6. —— *Trustee in Bankruptcy, Property passing to—Right of Action—Action for Trespass and Conversion—Claim for Personal Annoyance—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 54, 168.

In an action for trespass and seizure of goods, the plaintiff alleged damage to the premises, damage to the goods, and personal annoyance to himself and family. It being admitted that no substantial damage was done to the premises or to the goods:—

Held, that upon the bankruptcy of the plaintiff the right of action did not pass to his trustee in bankruptcy. ROSE *v.* BUCKETT - **C. A. 449**

—— Lessee adjudicated bankrupt on his own petition—Lease—Covenant not to assign—Forfeiture - - - 16
See LANDLORD AND TENANT. 3.

BANKRUPTCY RULES, 1886, r. 134 - 354
See BANKRUPTCY. 4.

BANKRUPTCY RULES, 1886—*continued.*
—— r. 190 - - - - - 16
See LANDLORD AND TENANT. 3.

BEER—Liability of innocent vendor for beer contaminated with arsenic - 290
See ADULTERATION. 1.

BEERHOUSE ACT—Licensing Acts - 157
See LICENSING ACTS. 2.

BENEFICE—Income tax—Perquisites or gains accruing by reason of office - 761
See REVENUE. 5.

BETTING—House used for—Advertisement of
See GAMING. 470

BIAS—Justices—Disqualification—Certiorari—Confirming authority, Order of - 357
See LICENSING ACTS. 1.

BILL OF COSTS—Right to order for taxation—Costs of solicitor of umpire—Third party - - - - 839
See SOLICITOR.

BILL OF LADING—Freight made payable as per charterparty—Right of master to sue
See SHIPPING. 1. 306

BILL OF SALE—*Registration not renewed—Apparent Possession—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 8, 11—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43).

The owner of furniture in a house of which he was the occupier, and in which he resided, granted an absolute bill of sale in respect of the furniture to his mother-in-law, who lived in the same house. This bill of sale was duly registered in the first instance, but the registration was not renewed as required by the Bills of Sale Act, 1878, s. 11. The grantee under this bill of sale subsequently gave a bill of sale in respect of the same goods by way of mortgage to secure an advance. This bill of sale was duly registered. The goods, which remained in the same house, in which the grantor of the first-mentioned bill of sale and his mother-in-law continued to reside, were subsequently taken in execution on a judgment against the said grantor, and were claimed by the grantee of the second bill of sale. On interpleader proceedings between the execution creditor and the claimant:—

Held (affirming the judgment of a Divisional Court), that the case was governed by *Cookson* v. *Swire*, (1884) 9 App. Cas. 653, and that the claimant was entitled to the goods as against the execution creditor. ANTONIADI *v.* SMITH. SMITH, CLAIMANT - - - - **C. A. 589**

BREACH OF CONTRACT—Servant, Agreement to engage and employ—Refusal to provide servant with work - - 653
See MASTER AND SERVANT. 1.

BREWER—Income tax—Deductions—Expenses of applications for new licences - 349
See REVENUE. 3.

BROKER.
See Cases under STOCK EXCHANGE.

—— Mortgage of shares—Stipulation that mortgagee shall be employed as broker by the company—Clog on redemption 550
See MORTGAGE.

BUILDINGS—Fees of district surveyor—Liability—Period of limitation - - 278
See LONDON. 1.

—— London county—Part of building used for purposes of trade, part for dwelling-house - - - - - 660
See LONDON. 2.

—— Theatres and music halls—Structural defects—Notice to remedy—Compliance 250
See LONDON. 3.

——Workmen's Compensation Act—Construction or repair of building—Whitewashing
See EMPLOYER AND WORKMAN. 2. 42

BURIAL—*Transfer of Powers of Burial Board—Expenses of Carrying into Execution Burial Acts — Poor-rate — General District Rate — Local Government—Urban District Council—Burial Act*, 1852 (15 & 16 *Vict. c.* 85)—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *ss.* 7, 62, 67.

Where an urban district council, under the power given by s. 62 of the Local Government Act, 1894, take over the powers, duties, and liabilities of a burial board within their district, the expenses of carrying the Burial Acts into execution continue to be chargeable upon and payable out of the poor-rate, and are not chargeable upon or payable out of the council's general district rate. THE KING *v.* CONNAH'S QUAY OVERSEERS Div. Ct. 174

BUTTER—Adulteration—Process of mixing milk with butter - - - - 825
See ADULTERATION. 2.

CAPTURE—Loss before commencement of war—Seizure—Public policy - - - 419
See INSURANCE, MARINE. 1.

"CAPTURE, SEIZURE, OR DETENTION"—Warranty against—Seizure by enemy's Government of property of its own subject - - - - - - 919
See INSURANCE, MARINE. 2.

CARRIAGE—Plying or driven for hire—Concealment of number-plate - - 169
See HACKNEY CARRIAGE.

CASES—*Boord* v. *African Consolidated Land and Trading Co.*, [1898] 1 Ch. 596, overruled
See COMPANY. 2. 665

—— *Carritt* v. *Godson*, [1899] 2 Q. B. 193, referred to - - - - 660
See LONDON. 2.

—— *Cock, In re*, (1887) 20 Q. B. D. 343, followed
See BANKRUPTCY. 2. 628

—— *Cookson* v. *Swire*, (1884) 9 App. Cas. 653, applicable - - - - 589
See BILL OF SALE.

—— *Delaroque* v. *S. S. Oxenholme & Co.*, [1883] W. N. 227, approved - - 230
See PRACTICE. 5.

—— *Finley, In re*, (1888) 21 Q. B. D. 475, followed - - - - - 628
See BANKRUPTCY. 2.

—— *Good, Ex parte. In re Armitage*, (1877) 5 Ch. D. 46, distinguished - 642
See ACCORD AND SATISFACTION.

CASES—*continued.*

—— *Harris* v. *May*, (1883) 12 Q. B. D. 97, not followed - - - 817
See ADULTERATION. 4.

—— *Hoddinott* v. *Newton, Chambers & Co.*, [1901] A. C. 49, referred to - - 42
See EMPLOYER AND WORKMAN. 2.

—— *Howell* v. *Coupland*, (1876) 1 Q. B. D. 258, followed - - - - 126
See CONTRACT. 2.

—— *Laidlaw* v. *Wilson*, [1894] 1 Q. B. 74, followed - - - - 817
See ADULTERATION. 4.

—— *Liverpool Corporation* v. *Llanfyllin Assessment Committee*, [1899] 2 Q. B. 14, distinguished - - - - 620
See RATES. 3.

—— *Lowe* v. *Pearson*, [1899] 1 Q. B. 261, distinguished - - - - 48
See EMPLOYER AND WORKMAN. 1.

—— *Morgan, In re*, (1889) 22 Q. B. D. 592, followed - - - - 628
See BANKRUPTCY. 2.

—— *Nell* v. *Longbottom*, [1894] 1 Q. B. 767, followed - - - - 75
See CORPORATION.

—— *Painter, Ex parte. In re Painter*, [1895] 1 Q. B. 85, distinguished - - 37
See BANKRUPTCY. 5.

—— *Reg.* v. *Manchester Justices*, [1899] 1 Q. B. 571, approved of - - - 357
See LICENSING ACTS. 1.

—— *Ridley* v. *Sutton*, (1863) 1 H. & C. 741; 32 L. J. (Ex.) 122, disapproved - 230
See PRACTICE. 5.

—— *Robertson* v. *Harris*, [1900] 2 Q. B. 117, not followed - - - - 817
See ADULTERATION. 4.

—— *Swift* v. *Jewsbury*, (1874) L. R. 9 Q. B. 301, followed - - - - 560
See FALSE REPRESENTATION.

—— *Taylor* v. *Caldwell*, (1863) 3 B. & S. 826, followed - - - - 126
See CONTRACT. 2.

—— *Victorian Railways Commissioners* v. *Coultas*, (1888) 13 App. Cas. 222, not followed
See NEGLIGENCE. 2. 669

—— *Williams* v. *London Assurance Co.*, (1813) 1 M. & S. 318; 14 R. R. 441, followed
See SHIPPING. 2. 861

—— *Wood* v. *Walsh & Sons*, [1899] 1 Q. B. 1009, no longer law - - - 42
See EMPLOYER AND WORKMAN. 2.

CERTIFICATE—Analysis—Sufficiency—Insertion of weight of sample - - 376
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—— Analyst—Sufficiency—Sale of food and drugs—Beer - - - 290
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CERTIORARI—Confirming authority, Order of—Justices—Disqualification—Bias, Likelihood of - - - 357
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CHARTERPARTY—Freight made payable as per charterparty—Right of master to sue - - - - - - 306
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CHILD—Illegitimate—Void contract—Contract by mother to give up possession of child
See PARENT AND CHILD. 385

CHURCHWARDEN — Election of parishioners' churchwarden—Right of incumbent to vote - - - - - - 225
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CLERK—Justices'—Power to appoint—Payment of salary - - - - - 257
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CLOG ON REDEMPTION—Mortgage of shares—Stipulation that mortgagee shall be employed as broker by the company 550
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CLOSING— Carriage door — Passenger — Negligence - - - - - 322
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—— Dwelling-house unfit for human habitation —Closing order - - - 265
See HOUSING OF WORKING CLASSES.

—— Stock Exchange, Usage of—Closing of client's account by broker - 493, 504
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COAL MINE—Lands Clauses Acts—Rise in value of coal after notice to treat, whether arbitrator can consider in assessing compensation - - - 798
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COLLATERAL AGREEMENT—Parol warranty that drains are in order - - 215
See LANDLORD AND TENANT. 1.

COLLIERY—Right of lessee to sink shaft in land of lessor not demised—Purchase by railway company - - - - 84
See LANDS CLAUSES ACTS. 2.

COLLISION—Policy—Collision between vessels, What is — Vessel riding at anchor — Collision with anchor - - 792
See INSURANCE, MARINE. 3.

COMPANY — *Debenture — Unauthorized Issue — Bonâ fide Holder for Value—Rights as against Execution Creditor.*

The rights of a bonâ fide holder for value of a debenture, which is in proper form and charges all the property of the company as security for the debenture debt, prevail over those of an execution creditor, even where the debenture is issued without authority, no directors of the company having been appointed and no resolution to issue debentures passed; provided that the holder had no notice of any irregularity in the issue of the debenture. DUCK *v.* TOWER GALVANIZING COMPANY. CALLUND, Claimant
Div. Ct. 314

2. —— *Register of Members — Inspection — Right to take Copies — Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 32.

The right conferred by s. 32 of the Companies Act, 1862, to inspect the register of members of a company under that Act, does not carry with it the right to take extracts from or to make copies of the entries in the register.

Boord v. *African Consolidated Land and Trading Co.*, [1898] 1 Ch. 596, overruled. *In re* BALAGHÂT GOLD MINING COMPANY - C. A. 665

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—— Directors' liability — Statements in prospectus — "Reasonable ground to believe"—Particulars - - 576
See PRACTICE. 7.

—— False representation—Signature of party to be charged—"Person"—Corporation—Signature by agent of company - 560
See FALSE REPRESENTATION.

—— Mortgage of shares—Stipulation that mortgagee shall be employed as broker by the company—Clog on redemption 550
See MORTGAGE.

—— Winding-up—Attachment of debts—Garnishee order—"Companies Liquidation Account" - - - - 199
See ATTACHMENT.

—— Winding-up — Fraudulent preference — Powers of committee - - 477
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COMPENSATION—Alien—Death—Negligence of British subject—Cause of action arising on high seas - - - 606
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—— Lands Clauses Act — Notice to treat — Interest created in other land subsequently to date of notice - - 753
See LANDS CLAUSES ACT. 3.

—— Lands Clauses Acts—Right of lessee to sink shaft in land of lessor not demised —Purchase by railway company 84
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—— Lands Clauses Acts—Rise in value of coal after notice to treat, whether arbitrator can consider in assessing compensation
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—— Workmen's Compensation Act.
See Cases under EMPLOYER AND WORKMAN.

CONDITION — Contract — Impossibility of performance—Implied condition—Cargo to be shipped by specified ship - 126
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—— Precedent — Public vaccinator — Offer to vaccinate child - - - 806
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CONSENT—Of Court in Lunacy, to bankruptcy proceedings—Summons for directions
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CONTINUATION CLAUSE—Validity—Stamp—Time policy for more than twelve months - - - - 567
See INSURANCE, MARINE. 7.

CONTINUING OFFENCE — Conviction — Averment of commission of offence on several discontinuous days - - 458
See CRIMINAL LAW. 3.

CONTRACT — *Assignability — Contract to supply Goods—Increase of Burden by Assignment.*

T. contracted with the I. Company to supply

CONTRACT—*continued.*

them for fifty years with at least 750 tons of chalk per week, and so much more as they might require for their manufacture of cement upon a certain piece of land, the chalk to be delivered in convenient daily quantities as required by the company by written notice given on the preceding day. The I. Company, which had a small capital and was doing a comparatively small business, went into voluntary liquidation and transferred all its business and property, and purported to assign this contract, to the A. Company, which was a very powerful company with a very large capital:—

Held, that, as the result of the assignment would be to impose a greater liability and burden upon T., he was not bound to supply chalk to the A. Company. TOLHURST *v.* ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900), LIMITED. ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900), LIMITED, AND IMPERIAL PORTLAND CEMENT COMPANY *v.* TOLHURST **Mathew J. 811**

2. —— *Impossibility of Performance—Implied Condition—Cargo to be Shipped by specified Ship—Ship damaged so as to be unable to receive Cargo.*

By a contract made in October, 1899, the defendants sold to the plaintiffs a cargo of cotton-seed, to be shipped per steamship *Orlando* at an Egyptian port during the month of January, 1900, and to be delivered to the plaintiffs in the United Kingdom. The contract provided that, in case of prohibition of export, blockade, or hostilities preventing shipment, the contract or any unfulfilled part thereof should be cancelled. In December, 1899, the *Orlando* was stranded through perils of the sea without default on the defendants' part, and was so much damaged as to render it impossible for her to arrive at the port of loading in time to load during January. In an action by the plaintiffs against the defendants for failure to ship a cargo under the contract:—

Held, by A. L. Smith M.R. and Romer L.J. (Vaughan Williams L.J. dissenting), that the contract must be construed as subject to an implied condition that, if at the time for its performance the *Orlando* should, without default on the defendants' part, have ceased to exist as a ship fit for the purpose of shipping the cargo, then the contract should be treated as at an end; and that the action was therefore not maintainable.

Taylor v. *Caldwell*, (1863) 3 B. & S. 826, and *Howell* v. *Coupland*, (1876) 1 Q. B. D. 258, followed.

Judgment of Mathew J., [1900] 2 Q. B. 298, affirmed. NICKOLL & KNIGHT *v.* ASHTON, EDRIDGE & Co. - - - - - **C. A. 126**

—— Broker, Default of—Claim by jobber against broker for difference between contract and "hammer" prices - - **844**
See STOCK EXCHANGE. 1.

—— Collateral agreement—Parol warranty that drains are in order - - **215**
See LANDLORD AND TENANT. 1.

—— Crown — Prerogative — Servants of the Crown—Liability to be sued - **781**
See CROWN.

CONTRACT—*continued.*

—— Illegitimate child—Void contract—Contract by mother to give up possession of child
See PARENT AND CHILD. **385**

—— Privity of contract—Broker, Default of—Liability of client to jobber - **53**
See STOCK EXCHANGE. 6.

—— Privity of contract — Broker including several orders in one contract—Liability of principal to jobber - - **73**
See STOCK EXCHANGE. 3.

—— Privity of contract — Broker including several orders in one contract—Usage of Stock Exchange - - **726**
See STOCK EXCHANGE. 2.

—— Servant, Agreement to engage and employ—Refusal to provide servant with work—Breach of contract - - **653**
See MASTER AND SERVANT. 1.

—— Trustee in bankruptcy—Disclaimer—"Unprofitable contract"—Contract for sale of lease - - - - **518**
See BANKRUPTCY. 18.

CONVERSION—Action for trespass and—Property passing to trustee - - **449**
See BANKRUPTCY. 6.

CONVEYANCE — Stamp duty — Production of instrument of conveyance — Personal property - - - - **773**
See REVENUE. 7.

CONVEYANCE ON SALE — Stamp — Family arrangement - - - **336**
See REVENUE. 8.

CONVEYANCING AND LAW OF PROPERTY—Lease—Covenant not to assign—Bankruptcy—Forfeiture - - - **16**
See LANDLORD AND TENANT. 3.

CONVICTION—Continuing offence—Averment of commission of offence on several discontinuous days - - - **458**
See CRIMINAL LAW. 3.

COPIES — Register of members — Inspection — Right to take copies - - **665**
See COMPANY. 2.

CORPORATION—*Election of Mayor—Validity of Vote of Disqualified Person—Right of Chairman to Vote—Casting Vote—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 42, *sub-s.* 1; *s.* 61, *sub-s.* 4; *s.* 87, *sub-s.* 1 (*d*); *s.* 102.

A town councillor, whose election is subsequently declared void, cannot prior to the avoidance of his election give a valid vote at the election of mayor.

Nell v. *Longbottom*, [1894] 1 Q. B. 767, followed.

The right under the Municipal Corporations Act, 1882, of the mayor of a municipal corporation to vote at the election of his successor can only be modified or taken away by a statutory enactment expressed in unequivocal language.

The expression "equality of votes" in s. 61, sub-s. 4, of the Municipal Corporations Act, 1882, means equality of valid votes, and therefore the mayor or chairman presiding at the election of a mayor may give a contingent or hypothetical casting vote, to come into operation if in the

CORPORATION—*continued.*
course of subsequent proceedings it should appear that there has been an equality of valid votes. BLAND *v.* BUCHANAN - - - **Div. Ct. 75**

—— Justices' clerk—Power to appoint—Payment of salary - - - - **257**
See LOCAL GOVERNMENT.

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—— Signature of party to be charged—"Person"—Signature by agent of company **560**
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CORPORATION DUTY—Real property—Principle of assessment—"Annual value, income, or profits" - - **400**
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COSTS—County court—Judgment for 50*l.* against both defendants, and for more than 50*l.* against one defendant - - - **23**
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—— Libel, Action for—Plea of justification and privilege—Defendant successful on one and unsuccessful on the other - **855**
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—— Married woman's liability to costs—"Proceeding instituted"—Interpleader proceedings - - - - **487**
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—— Security for costs—Workmen's compensation—Appeal from county court - **304**
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—— Taxation—Guardian ad litem—Official solicitor - - - - **460**
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—— Taxation—Right to order for—Costs of solicitor of umpire—Third party—Arbitration - - - - **839**
See SOLICITOR.

—— Taxation—Witness—Examination before examiner—Depositions not used at trial
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—— Way—Public right of—Removal of obstruction by private individual—Costs - - - - **268**
See WAY, RIGHT OF.

COUNTY COURT—*Jurisdiction—Application for Judgment Summons—Insufficiency of Affidavit—Waiver—Prohibition—County Court Rules*, 1889, *Order* XXV., *rr.* 13, 14*a*, *Form* 52A.

An affidavit in support of an application for leave to issue a judgment summons out of the district of the county court in which judgment had been obtained was defective as not being in accordance with Form 52A of the County Court Rules, 1889. Leave was granted and an order for commitment made. On an application for a writ of prohibition:—

Held, that the want of jurisdiction appeared on the face of the proceedings, and could not be waived. ALDERSON *v.* PALLISER - **C. A. 833**

2. —— *Jurisdiction—Application for New Trial—Power to enter Judgment—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 93.

A county court judge has no jurisdiction, on an application for a new trial of an action tried in the county court, to enter judgment for the applicant. ROBINSON *v.* FAWCETT & FIRTH **Div. Ct. 325**

3. —— *Jurisdiction—Remitted Action—Invalid Order to Remit not appealed against—Objection to Jurisdiction at Trial—Prohibition—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 65—*County Court Rules*, 1889, *Order* XXXIII., *r.* 1.

By the County Courts Act, 1888, s. 65, where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed 100*l.*, or where such claim, though it originally exceeded 100*l.*, is reduced by payment, an admitted set-off or otherwise, to a sum not exceeding 100*l.*, an order may be made for the trial of the action in a county court.

In an action of contract brought in the High Court, in which the sum indorsed on the writ exceeded 100*l.*, the plaintiff at the hearing by a master of a summons under the above section abandoned the excess above 100*l.*, and the master made an order for trial of the action in the county court. The defendant did not appeal against the order, but at the trial in the county court objected to the jurisdiction; the judge, considering himself bound by the order, tried the action and gave judgment for the plaintiff; the defendant thereupon applied for a writ of prohibition:—

Held, (1.) that the master's order was improperly made, the excess not having been abandoned before the issue of the writ in the High Court; but (2.) that, the defendant not having appealed against the order, the objection raised at the trial was made too late, and the county court judge was not bound to inquire into the circumstances under which the order was made, and was not guilty of any excess of jurisdiction in trying the action. DIERKEN *v.* PHILPOT **Div. Ct. 380**

4. —— *Statutory Defence—Notice—Gaming and Wagering Contract—County Court Rules*, 1889, *Order x.*, *rr.* 10, 18*a*—*Gaming Act*, 1892 (55 *Vict. c.* 9), *s.* 1.

In an action in the county court for commission, the defence that the promise to pay commission was null and void under s. 1 of the Gaming Act, 1892, as being made in respect of a gaming and wagering contract, is a statutory defence of which notice must be given under Order x., rr. 10 and 18*a*, of the County Court Rules, 1889. WILLIS *v.* LOVICK - **Div. Ct. 195**

—— Costs—Judgment for 50*l.* against both defendants, and for more than 50*l.* against one defendant - - - **23**
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—— Costs, Security for—Appeal from county court—Workmen's compensation **304**
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—— Married woman's liability to costs—"Proceeding instituted"—Interpleader proceedings - - - - **487**
See HUSBAND AND WIFE.

COUNTY COURT RULES, 1889, Order X., rr, 10, 18a - - - - - **195**
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COUNTY COURT RULES, 1889—*continued.*

—— **Order XXV., rr. 13, 14a, Form 52a** - **833**
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—— **Order XXVII., rr. 1, 2, 4 (a)** - - **487**
See HUSBAND AND WIFE.

—— **Order XXXIII., r. 1** - - - **380**
See COUNTY COURT. 3.

COVENANT—Not to assign—Lessee adjudicated bankrupt on his own petition—Forfeiture - - - - **16**
See LANDLORD AND TENANT. 3.

—— To pay and discharge "impositions"—Lessee—Sanitary authority - **151**
See LANDLORD AND TENANT. 2.

CREDITOR — Execution — Debenture — Unauthorized issue — Bonâ fide holder for value - - - - **314**
See COMPANY. 1.

—— Fraudulent preference — Winding-up — Powers of committee - - **477**
See INDUSTRIAL AND PROVIDENT SOCIETY.

—— Receiving order — Stay of proceedings—"Creditors" — Service of notice of appeal - - - - **354**
See BANKRUPTCY. 4.

CRIMINAL LAW — *Larceny—Advertisement of Reward for return of Stolen Property—Penalty—"Any Property whatsoever"—Dog—Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *s.* 102.

A dog is included in the words "any property whatsoever" in s. 102 of the Larceny Act, 1861; which imposes a penalty on any one who publicly advertises a reward for the return of any property whatsoever which shall have been stolen or lost, and uses in such advertisement any words purporting that no questions will be asked, and on any one who prints or publishes such an advertisement. MIRAMS *v.* OUR DOGS PUBLISHING COMPANY - - - - **C. A. 564**

2. —— *Larceny—Deer—Deer usually kept in a Forest—Killing outside Forest—Unlawful Possession—Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *ss.* 12, 14.

A person who kills and carries away a deer, usually kept in a forest, when it is outside of the limits of the forest and upon the land of a third person, cannot be convicted, under s. 14 of the Larceny Act, 1861, of being in unlawful possession thereof. THRELKELD *v.* SMITH **Div. Ct. 531**

3. —— *Practice — Conviction — Continuing Offence—Averment of Commission of Offence on several Discontinuous Days.*

An information charged the defendant, a licensed victualler, with permitting his house to be used as a brothel on the 26th, 28th, 29th, and 31st days of January, and the 1st, 4th, 5th, and 6th days of February in the same year, contrary to s. 15 of the Licensing Act, 1872:—

Held, that the fact of the days named being non-consecutive did not prevent the charge from being a charge of one continuing offence; that the information was consequently not bad for duplicity; and that the defendant might on such an information be lawfully convicted of so permitting his house to be used on all the days named. *Ex parte* BURNBY - **Div. Ct. 458**

CROWN—*Prerogative—Servants of the Crown—Contracts—Liability to be Sued—The Commissioners of Public Works and Buildings.*

An action will lie against His Majesty's Commissioners of Public Works and Buildings, who are incorporated by statute, for damages for breach of a contract entered into by them with a firm of builders for the erection of a public building:—

So *held*, by Ridley J., because the Commissioners must be taken to have made the contract specially themselves, and not as agents for the Crown;

By Phillimore J., because the Commissioners are in the position of servants of the Crown who may be sued on their contracts for the purpose of obtaining a judgment declaratory of the right of the subject who has contracted with them. GRAHAM *v.* PUBLIC WORKS AND BUILDINGS COMMISSIONERS - - - - **Div. Ct. 781**

CURATOR BONIS — Lunatic debtor — English lunacy — Committee — Curator bonis — Scottish jurisdiction — Locus standi — Bankruptcy proceedings - - **32**
See BANKRUPTCY. 3.

CUSTOMS AND INLAND REVENUE.
See Cases under REVENUE.

DAMAGE—Remoteness—Nervous shock resulting from fright - - - - **669**
See NEGLIGENCE. 2.

—— Trustee in bankruptcy, Property passing to —Action for trespass and conversion—Claim for personal annoyance - **449**
See BANKRUPTCY. 6.

DAMAGES—*Measure of—Stockbroker—Wrongful Sale of Shares.*

The defendants, a firm of stockbrokers, in pursuance of a contract in that behalf bought shares on the Stock Exchange on behalf of a principal, and contracted that they would at any time before the settling day, if so directed, sell the same upon the principal's behalf. Before the settling day arrived the defendants in breach of their contract sold the shares without the principal's consent:—

Held, that in an account taken between the defendants and the principal the latter was entitled to be credited, in respect of the shares so wrongfully sold, with the highest prices that the same might have realized in the market at any time between the date of the sale and the settling day. MICHAEL *v.* HART & Co.
Wills J. 867

DEATH — Compensation — Alien — Negligence of British subject—Cause of action arising on high seas - - - **606**
See NEGLIGENCE. 1.

DEBENTURE — Unauthorized issue—Bonâ fide holder for value—Rights as against execution creditor - - - **314**
See COMPANY. 1.

DEBT — Assignment — Same debt assigned to different persons — Priority—Notice to debtor - - - - **829**
See ASSIGNMENT.

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—— "Debt"—Attachment of—Garnishee order—"Companies Liquidation Account" *See* ATTACHMENT. 199

—— Judgment debt—Joint and several debt—Release of one co-debtor—Extinguishment of debt - - - - 642
See ACCORD AND SATISFACTION.

DEER—Larceny—Deer usually kept in a forest—Killing outside forest—Unlawful possession - - - - - 531
See CRIMINAL LAW. 2.

DEFAMATION—*Libel—Privileged Communication — Publication — Post-card — Evidence of Malice.*

The defendant sent a post-card through the post on an occasion which, as between the defendant and the person to whom the post-card was sent, was privileged. The statements contained in the post-card had reference to the plaintiff, and would, if connected with him, have been defamatory of him, but the post-card did not disclose the name of the plaintiff or contain any indication that the statements in it referred to him, and no evidence was produced to shew that those statements were understood to refer to the plaintiff by any person through whose hands the post-card passed except the person to whom the post-card was sent:—

Held, that the plaintiff had failed to shew publication of a libel on him other than on a privileged occasion, and that, though the mere fact that a communication had been sent by post-card instead of by a closed letter would generally be evidence of malice, in the present case, inasmuch as the communication would not be understood by the persons through whose hands it passed as referring to the plaintiff, there was no evidence of express malice to avoid the privilege. SADGROVE *v.* HOLE - - - C. A. 1

2. —— *Slander—Words not actionable per se—Imputation of Insolvency against Solicitor—Words spoken in relation to his Profession.*

In an action of slander it was proved that the defendant spoke of the plaintiff, who was a solicitor, upon one occasion: "Have you heard about our neighbour along here? They tell me he has gone for thousands instead of hundreds this time"; and upon another occasion: "Have you heard anything about Mr. Dauncey? It seems to be a worse job than the other was. Miss Allen told me Mr. Dauncey has lost thousands":—

Held, that, in the absence of special damage, the words were not actionable, as they were not reasonably capable of being construed as conveying an imputation on the plaintiff in his business as a solicitor. DAUNCEY *v.* HOLLOWAY C. A. 441

—— Libel—Costs—Pleas of justification and privilege—Defendant successful on one and unsuccessful on the other - 855
See PRACTICE. 1.

DELAY — Reinsurance—Unreasonable delay of voyage—Material alteration of risk 912
See INSURANCE, MARINE. 6.

DESERTION — Merchant Shipping Acts—Offences — Foreign ship, Persuading seaman to desert from - - 579
See SHIPPING. 3.

DIRECTOR—Liability—Statements in prospectus—"Reasonable ground to believe"—Particulars - - - - 576
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DISCLAIMER — Lease — Trustee of bankrupt assignee — Mortgage by sub-demise—Vesting order - - - 628
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—— Trustee — "Unprofitable contract"—Contract for sale of lease - - 518
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DISCOVERY—Affidavit of documents—Further affidavit—"Specific documents" 241
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DISQUALIFICATION — Justices — Bias, Likelihood of—Certiorari—Confirming authority, Order of - - - 357
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DOCUMENTS—Affidavit of—Discovery—Further affidavit—"Specific documents" 241
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DOG — Larceny — Advertisement of reward for return of stolen property—Penalty 564
See CRIMINAL LAW. 1.

DRAIN—Acquisition of easement by public—Highway - - - - 101
See PRESCRIPTION.

—— Collateral agreement—Parol warranty that drains are in order - - - 215
See LANDLORD AND TENANT. 1.

DRAINAGE—New house—Separate drains for sewage and surface water—Discretion of urban council - - - 540
See SEWERS.

DRUGS—Sale of food and.
See Cases under ADULTERATION.

DUTY—Public revenue.
See Cases under REVENUE.

EASEMENT—Drain—Prescription—Acquisition of easement by public—Highway 101
See PRESCRIPTION.

ECCLESIASTICAL LAW—*Churchwarden—Election of Parishioners' Churchwarden—Right of Incumbent to Vote—Canon* 89—*The Vestries Act*, 1818 (58 *Geo.* 3, *c.* 69), *s.* 3.

An incumbent of a parish, who, upon the failure of himself and the parishioners to agree upon the choice of churchwardens, exercises his right of appointing one churchwarden, is not entitled either by the common law, or under s. 3 of the Vestries Act, 1818, in his capacity as a ratepayer, to vote at the election of the second churchwarden.

Judgment of the Queen's Bench Division, [1901] 1 Q. B. 573, affirmed. THE KING *v.* BISHOP OF SALISBURY - - - C. A. 225

—— Income tax—Incumbent of benefice—Perquisites or gains accruing by reason of office - - - - 761
See REVENUE. 5.

—— Patent of commissary and vicar general—Reservation to bishop of certain causes 141
See PROHIBITION.

ELECTION—Mayor—Validity of vote of disqualified person—Right of chairman to vote—Casting vote - - - - 75
See CORPORATION.

—— Parishioners' churchwarden—Right of incumbent to vote - - - 225
See ECCLESIASTICAL LAW.

EMPLOYER AND WORKMAN—*Compensation—Accident arising out of and in the Course of the Employment—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1.

A workman was employed as a carpenter, and part of his duty was to sharpen his tools on a grindstone rotated by machinery. He had received orders not to touch the machinery. The band that rotated the grindstone having slipped he endeavoured to replace it, and in doing so was injured. On a claim for compensation under the Workmen's Compensation Act, 1897, the county court judge found that the accident arose out of and in the course of the employment of the workman, and negatived serious and wilful misconduct on his part, and made an award in his favour. On appeal:—

Held, that the disobedience of the master's order did not of itself prevent the act of the workman from being an act done in the course of his employment, and that as it had not been shewn that the replacing of the band was an act on the part of the workman so remote from his ordinary duties that it could not fairly be said to be one arising out of and in the course of his employment, the award must stand.

Lowe v. *Pearson*, [1899] 1 Q. B. 261, distinguished. WHITEHEAD *v.* READER - **C. A. 48**

2. —— *Compensation—Construction or Repair of Building—Whitewashing—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

A workman employed in whitewashing a ceiling, in a house exceeding thirty feet in height, fell from a scaffolding on which he was standing, and was killed. In an action by his widow to recover compensation:—

Held, that the employment of the deceased was in a building which was being repaired within the meaning of s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897, and that the applicant was entitled to an award.

Since the decision of the House of Lords in *Hoddinott* v. *Newton, Chambers & Co.*, [1901] A. C. 49, the decision of the Court of Appeal in *Wood* v. *Walsh & Sons*, [1899] 1 Q. B. 1009, is no longer law. DREDGE *v.* CONWAY, JONES & Co. **C. A. 42**

3. —— "*Machinery or Plant connected with or used in the Business of the Employer*"—*Injury to Workman — Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 1.

A workman was injured while assisting on a Sunday in the removal of a machine in his employers' workshop. The machine, which was defective to the knowledge of the foreman, had broken down on the previous day and had finally ceased to be used in the employers' business at the time of the accident; it was being removed from its place in the centre of the workshop out of the way until it could be finally removed from the employers' premises;—

Held, that the machine was not "machinery or plant connected with or used in the business of the employers" within the meaning of s. 1, sub-s. 1, of the Employers' Liability Act, 1880, and that the employers were not liable. THOMPSON *v.* CITY GLASS BOTTLE COMPANY **Div. Ct. 483**

4. —— *Truck Act—Contract for Deductions in respect of Fines—Specification of Acts or Omissions in respect of which Fine may be imposed—Truct Act*, 1896 (59 & 60 *Vict. c.* 44), *s.* 1.

By s. 1, sub-s. 1, of the Truck Act, 1896, an employer may not contract with a workman for any deduction from wages in respect of fines unless (inter alia) "the contract specifies the acts or omissions in respect of which the fine may be imposed."

One of the rules of a factory provided that "all workers shall observe good order and decorum while in the factory," and imposed a fine of sixpence or less upon any worker guilty of an infringement of the rule:—

Held, that the rule, although not specifying the particular acts or omissions amounting to such a breach of good order or decorum as to justify the infliction of a fine, was a sufficient compliance with the requirements of the section. SQUIRE *v.* BAYER & Co. - - **Div. Ct. 299**

—— Agreement to engage and employ servant—Refusal to provide servant with work—Breach of contract - - **653**
See MASTER AND SERVANT. 1.

—— Costs, Security for—Workmen's compensation—Appeal from county court **304**
See PRACTICE. 3.

—— Factory Acts.
See Cases under FACTORY ACTS.

—— Negligence of servant—Servant of one person lent to another—Control of servant - - - - - **596**
See MASTER AND SERVANT. 2.

—— Seduction—Evidence of service—Weekly leave of absence - - - **722**
See SEDUCTION.

ESTATE DUTY—Property passing on death of deceased - - - - **331**
See REVENUE. 2.

ESTOPPEL—*Res Judicata—Affiliation Proceedings—Paternity of Child—Judgment of Quarter Sessions—Action for Seduction.*

In affiliation proceedings against the defendant he appealed to quarter sessions against an order of justices adjudging him to be the father of A.'s illegitimate child, and the court of quarter sessions quashed the order on the ground that he was not the father. Subsequently an action for damages for the seduction of A. was brought by her mother against the defendant:—

Held, that the plaintiff in the action was not estopped by the decision of the court of quarter sessions from alleging that the defendant was the father of the child. ANDERSON *v.* COLLINSON **Div. Ct. 107**

ESTOPPEL—*continued.*

—— Sale of goods—Loss to one of two innocent persons through fraud of a third person
See SALE OF GOODS. 697

EVIDENCE — Milk prosecution — Written warranty - - - - 817
See ADULTERATION. 4.

—— Nuisance—Black smoke - - 186
See NUISANCE. 2.

—— Of malice—Libel—Privileged communication—Publication—Post-card - 1
See DEFAMATION. 1.

—— Seduction—Master and servant—Evidence of service—Weekly leave of absence
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EXAMINATION — Costs — Taxation—Witness—Depositions not used at trial - 230
See PRACTICE. 5.

EXECUTION CREDITOR—Rights as against—Debenture—Unauthorized issue—Bonâ fide holder for value - - 314
See COMPANY. 1.

EXEMPTION — Stamp — Settlement — Power of appointment - - - 342
See REVENUE. 9.

EXPECTANCY—Legacy duty—Assignment by person entitled in expectancy—Persons having "an absolute interest therein," who are - - - - 391
See REVENUE. 6.

FACTORY ACTS—"*Factory*," *what is*—*Premises used for Adapting Articles for Sale*—*Mechanical Power used "in aid of" Manufacturing Process*—*Process of Bottling Beer and Washing Bottles*—*Factory and Workshop Act*, 1878 (41 *Vict. c.* 16), s. 93.

By s. 93 of the Factory Act, 1878, the expression "non-textile factory" means, inter alia (sub-s. 3 (*c*)), any premises wherein any manual labour is exercised by way of trade or for the purposes of gain "in or incidental to the adapting for sale of any article, and wherein, or within the close or curtilage or precincts of which, steam, water, or other mechanical power is used in aid of the manufacturing process carried on there."

The respondents occupied premises which they used solely for the purpose of washing bottles and bottling beer in their trade of wholesale and retail beer dealers. Before the bottles were filled with beer, which was done by manual labour only, they were washed inside by a rotary brush driven by a small gas-engine, the bottles being held in position by hand:—

Held, upon the facts above stated, that the respondents' premises were not a "factory" within the definition in s. 93, sub-s. 3 (*c*). LAW *v.* GRAHAM - - - - Div. Ct. 327

2. —— "*Workshop*" — "*Adapting for Sale*" —*Factory and Workshop Act*, 1878 (41 *Vict. c.* 16), *s.* 93.

Premises which were used in the daytime as a shop for the sale of sweetmeats by retail were used at night after shop hours for the purpose of packing the sweetmeats into the ornamental boxes in which they were sold:—

Held, that on those facts there was evidence to justify the finding that the premises were a "workshop" within the meaning of the Factory and Workshop Act, 1878. FULLERS, LIMITED *v.* SQUIRE - - - - - Div. Ct. 209

FALSE REPRESENTATION—*Signature of Party to be Charged*—9 *Geo.* 4, *c.* 14, *s.* 6—"*Person*"—*Corporation*—*Signature by Agent of Company.*

The word "person" in the 6th section of 9 Geo. 4, c. 14, includes a corporation; and an incorporated company is, under the terms of that section, not liable for a false representation of the kind contemplated by the section, made in a letter written and signed by their agent.

Swift v. *Jewsbury*, (1874) L. R. 9 Q. B. 301, followed. HIRST *v.* WEST RIDING UNION BANKING COMPANY - - - - C. A. 560

FAMILY ARRANGEMENT — Stamp — Conveyance on sale - - - - 336
See REVENUE. 8.

FATAL ACCIDENTS — Compensation for death—Alien—Negligence of British subject—Cause of action arising on high seas.
See NEGLIGENCE. 1. 606

FEES—Weights and measures—Verification and stamping—Inspector, Duty of, to take fees - - - - - 117
See WEIGHTS AND MEASURES.

FIDUCIARY CAPACITY—Stock Exchange, Usage of—Sale and repurchase of shares by broker — Profit made by broker on transaction
See Cases under STOCK EXCHANGE.

FINANCE ACT—Estate duty—Property passing on death of deceased - - 331
See REVENUE. 2.

—— Stamp duty—Transfer of personal property
See REVENUE. 7. 773

FINES—Truck Act—Contract for deductions in respect of fines - - - 299
See EMPLOYER AND WORKMAN. 4.

FISHERY ACTS—*Fishery District*—*Definition of Limits by Board of Trade Certificate*—*River*—*Reservoir*—*Salmon Fishery Act*, 1865 (28 & 29 *Vict. c.* 121), *s.* 35—*Freshwater Fisheries Act*, 1878 (41 & 42 *Vict. c.* 39), *ss.* 6, 7.

Sect. 6 of the Freshwater Fisheries Act, 1878, which extends the provisions of the Salmon Fishery Acts relating to fishery districts to "all waters within the limits of this Act frequented by trout or char," does not give fishery boards jurisdiction over waters of a different character from those referred to in the Salmon Fishery Acts, and has, therefore, no application to an artificial reservoir although it is frequented by trout or char. STEAD *v.* NICHOLAS - - - Div. Ct. 163

2. —— *Oysters*—*Laying Oysters on Foreshore to get rid of Impurities*—*Incident of Public Right of Fishing* — *Municipal Corporation*—*Power to acquire Lease of Foreshore*—*Sea Fisheries Act*, 1868 (31 & 32 *Vict. c.* 45), *s.* 41.

The oysters in a certain oyster fishery were

FISHERY ACTS—*continued.*
when freshly dredged unfit for consumption by reason of their being contaminated with certain impurities in the water in which the oyster beds were situate, and the fishermen in order to render the oysters marketable had been used from time immemorial to deposit them for a time after dredging upon the foreshore in another part of the fishery where the water was pure:—

Held, that this practice might be justified as against the owners of the soil of the foreshore as being incidental to the enjoyment of the public right of oyster fishing both by custom and by the common law.

Where a municipal corporation has obtained an order from the Board of Trade conferring a right of regulating an oyster fishery under the Sea Fisheries Act, 1868, it may by virtue of s. 41 of that Act lawfully take a lease of the foreshore of the fishery if the acquisition of the leasehold will enable it the better to carry out the purposes of the order. TRURO CORPORATION *v.* ROWE
Wills J. 870

FOOD AND DRUGS—Sale of - - 290
See Cases under ADULTERATION.

FOREIGN SHIP—Persuading seaman to desert from — Merchant Shipping Acts — Offences - - - - 579
See SHIPPING. 3.

FORESHORE — Power to acquire lease of — Municipal corporation - - 870
See FISHERY ACTS. 2.

FORFEITURE—Lease—Covenant not to assign —Lessee adjudicated bankrupt on his own petition - - - - 16
See LANDLORD AND TENANT. 3.

FRAUD—Sale of goods—Estoppel—Loss to one of two innocent persons through fraud of third person - - - 697
See SALE OF GOODS.

FRAUDULENT PREFERENCE — Winding-up— Powers of committee - - 477
See INDUSTRIAL AND PROVIDENT SOCIETY.

FREIGHT—Bill of Lading—Freight made payable as per charterparty — Right of master to sue - - - 306
See SHIPPING. 1.

—— General average—Sacrifice made on outward voyage of ship in ballast—Liability of chartered freight to contribute
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—— Pledge of freight not conditional—Part of freight payable—Partial loss - 412
See INSURANCE, MARINE. 4.

FRESHWATER FISHERIES — Reservoir — Definition of limits by Board of Trade certificate - - - - 163
See FISHERY ACTS. 1.

FRIGHT — Nervous shock resulting from — Remoteness of damage - - 669
See NEGLIGENCE. 2.

GAMING—*Betting, House used for—Advertisement of—Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 7—*Betting Act*, 1874 (37 & 38 *Vict. c.* 15), *s.* 3.

The plaintiff was the occupier of an office situate in Holland, and also the proprietor of a newspaper published weekly in London. Each number of the newspaper contained a notice of what was called a "coupon competition"—that is to say, of a promise by the plaintiff to pay a certain specified sum of money to such persons as should correctly guess the result of a certain horse-race then shortly about to be run, and should write their guesses upon certain forms called "coupons" which were issued with each number of the newspaper, and should send the coupons so filled up to the plaintiff's office in Holland, together with the sum of one penny in respect of each guess made. The defendants, who had made a contract with the plaintiff to publish the said newspaper on his behalf, refused to perform their contract upon the ground that the publication of the newspaper was illegal as being an infringement of s. 7 of the Betting Act, 1853, and of s. 3 of the Betting Act, 1874:—

Held, that, whether the fact of the plaintiff's office being situate out of the jurisdiction was sufficient to prevent the business so carried on by the plaintiff from constituting an offence against the Betting Acts or not, there was nothing in the above-mentioned sections to render illegal the publication by the defendants of the newspaper advertising the said business. STODDART *v.* ARGUS PRINTING COMPANY - Div. Ct. 470

—— Statutory defence — Notice — Gaming and wagering contract - - - 195
See COUNTY COURT. 4.

GARNISHEE ORDER—Attachment of debts— "Companies Liquidation Account"
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HACKNEY CARRIAGE — *Licence — Carriage Plying or Driven for Hire—Concealment of Number-plate — Local Government — By-law — Town Police Clauses Act*, 1847 (10 & 11 *Vict. c.* 89), *s.* 38.

A by-law made under the Town Police Clauses Act, 1847, provided that "every proprietor of a hackney carriage" should cause the number of the licence granted to him in respect of that carriage to be marked on a plate fixed on the outside of the carriage, and should not cause or suffer the plate to be concealed from public view "while such carriage may stand, ply, or be driven for hire." By s. 38 of the Town Police Clauses

HACKNEY CARRIAGE—*continued.*
Act, 1847, every wheeled carriage "used in standing or playing for hire in any street" shall be deemed to be a hackney carriage within the meaning of the Act.

The proprietor of a hackney carriage licensed under the Act, having received an order for a carriage to take a person from his house to a railway station, sent the licensed carriage direct from the yard with the number-plate concealed from view by a board placed over it, and in that condition the carriage was driven from the house of the person who had given the order to the railway station along a street within the district to which the by-law applied. The proprietor having been convicted by justices of an offence against the by-law:—

Held, that the carriage, whilst it was so being driven along the street, was a "hackney carriage" within the meaning of s. 38 of the Town Police Clauses Act, 1847; that the by-law applied to it; and that the conviction was, therefore, right. HAWKINS *v.* EDWARDS **Div. Ct. 169**

HIGHWAY—Drain—Prescription—Acquisition of easement by public - - **101**
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HOUSING OF WORKING CLASSES — *Local Government—Local Authority—Powers—Dwelling-house unfit for Human Habitation—Closing Order—"Dwelling-house"—Housing of the Working Classes Act*, 1890 (53 & 54 *Vict. c.* 70), *ss.* 29, 32.

By s. 32, sub-s. 1, of the Housing of the Working Classes Act, 1890, it is the duty of a local authority to take proceedings against the owner or occupier for the closing of a dwelling-house which is unfit for human habitation; and by sub-s. 2, "any such proceedings may be taken for the express purpose of causing the dwelling-house to be closed whether the same be occupied or not." By s. 29, "In this part of the Act, unless the context otherwise requires, the expression 'dwelling-house' means any inhabited building. . . ."

A local authority applied for a closing order in respect of three dwelling-houses which were admittedly unfit for human habitation. The houses had been closed by the owner for five and a half years for all purposes of human habitation, and they had not been used for such purposes during that period, nor had the owner any intention of allowing them to be so used in their present condition. A magistrate having refused to make a closing order:—

Held, that the definition of "dwelling-house" in s. 29 did not operate to curtail the powers of the local authority under s. 32; that the mere fact of non-occupancy was not in itself an objection to the making of a closing order, and that the magistrate was wrong. ROBERTSON *v.* KING **Div. Ct. 265**

HUSBAND AND WIFE—*Married Woman's Liability to Costs—"Proceeding instituted"—Interpleader Proceedings—Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 2—*County Court Rules*, 1889, *Order* XXVII., *rr.* 1, 2, 4 (*a*).

A written claim made by a married woman to goods or chattels taken in execution under the process of the Court, and served by her on the sheriff or high bailiff of a county court, is a "proceeding instituted" by her within the meaning of s. 2 of the Married Women's Property Act, 1893. Where therefore in the subsequent interpleader proceedings she fails to establish her claim to the goods, the Court has jurisdiction under that section to order payment of the execution creditor's costs of the interpleader proceedings out of property of the claimant which is subject to a restraint on anticipation, and to enforce payment by the appointment of a receiver. NUNN & CO. *v.* TYSON. TYSON, CLAIMANT **Div. Ct. 487**

ILLEGITIMATE CHILD—Void contract—Contract by mother to give up possession of child - - - - **385**
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—— Incumbent of benefice—Perquisites or gains accruing by reason of office - **761**
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INDUSTRIAL AND PROVIDENT SOCIETY—*Winding-up — Powers of Committee — Lien on Shares—Set-off against Debts due from Member—Creditor—Fraudulent Preference—Industrial and Provident Societies Act*, 1893 (56 & 57 *Vict. c.* 39), *s.* 23, *sub-s.* 2—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 164.

By the rules of a co-operative society for supplying goods to its members, which was registered under the Industrial and Provident Societies Act, 1893, each member was required to hold a certain number of shares in the society, and was at liberty to withdraw his share capital under certain conditions upon giving notice to the manager. The appellant, a member of the society, being unable owing to a strike to pay for goods supplied to him, the managing committee on four occasions debited the amount standing to his credit as a shareholder with sums due from him to the society for goods, the total amount so debited being about equal to the amount of his share capital; no notice under the rules to withdraw his capital had been given by the appellant. The society was in financial difficulties, and was at the date of the last two transactions hopelessly insolvent to the knowledge of the managing committee; but the committee, who had adopted the same course with other shareholders, acted bonâ fide and without intent to prefer any particular shareholder. Upon a summons taken out by the liquidator of the society to set aside the transactions:—

Held, that the transactions were not to be treated as withdrawals of capital by the appellant, but were valid under s. 23, sub-s. 2, of the

INDUSTRIAL AND PROVIDENT SOCIETY — *continued.*

Industrial and Provident Societies Act, 1893, which gives to a society registered under the Act a lien upon the shares of a member and a right to set off any sum credited to a member upon his shares towards the payment of any debt due from him to the society:

Held, further, that the last transaction, although within three months of the passing of a resolution for winding up the society, was not void under s. 164 of the Companies Act, 1862, as an undue or fraudulent preference of a creditor, the appellant not being a creditor of the society within the meaning of that section. *In re* GWAWR-Y-GWEITHYR INDUSTRIAL AND PROVIDENT SOCIETY, LIMITED. DOVEY *v.* MORGAN - Div. Ct. 477

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INSURANCE—*War, Declaration of—Insurance of Products of Mine in Foreign Country—Seizure by Enemy's Government of Things Insured—Validity of Insurance—Public Policy.*

The plaintiffs were registered as a joint stock company in Natal, their only property being a gold mine owned and worked by them in the Transvaal. Before October, 1899, when war was declared between the Transvaal Republic and this country, the plaintiffs had effected with the defendant, a British subject, a policy of insurance of certain gold products of their mine, the perils insured against including "enemies," and "arrests, restraints, and detainments of kings, princes, and people." A few days after war was declared the agents of the Transvaal Government seized and carried away some of the gold products insured. The plaintiffs had shut down their mine when war was declared, and there was nothing to shew that they intended to continue their business or mining operations in the Transvaal afterwards. In an action on the policy to recover in respect of the gold products so seized:—

Held, that there was no ground of public policy which prevented the policy of insurance from continuing in force after war was declared, and therefore that the plaintiffs were entitled to recover. NIGEL GOLD MINING COMPANY *v.* HOADE - - - - Mathew J. 849

INSURANCE, MARINE—*Capture—Property of Alien Enemy—Loss before Commencement of War—Intention to wage War—Seizure by Enemy's Government of Property of its own Subject—Validity of Insurance—Public Policy.*

Gold, the property of a mining company, which was incorporated under the laws of the Transvaal, but whose shareholders were almost all resident in Europe and were not subjects of the Government of the Transvaal, was insured with British underwriters against capture (amongst other risks) during transit from mines in the Transvaal to the United Kingdom. During the transit the gold was seized by the Government of the Transvaal. At the time of the seizure war between this country and the Transvaal was imminent, but the British Government did not treat the seizure of the gold as an hostile act, and war did not commence for some days afterwards.

An action having been brought by the company to recover for the loss of the gold on the policy of insurance, the underwriters defended it on the ground that the plaintiff company was a subject of the Government of the Transvaal, and the gold was seized by that Government for the purposes of expected hostilities with this country, and that the insurance of the plaintiffs' property against risk of such a seizure was against public policy. It was agreed between the parties that the case should be dealt with as if the war were ended:—

Held, by the Court (A. L. Smith M.R. and Romer L.J., Vaughan Williams L.J. dissenting), that the insurance of the plaintiffs' property against such a seizure as had taken place was not contrary to public policy, and that the action was therefore maintainable.

Judgment of Mathew J., [1900] 2 Q. B. 339, affirmed. DRIEFONTEIN CONSOLIDATED GOLD MINES, LIMITED *v.* JANSON - - C. A. 419

2. —— *Capture—Property of Alien Enemy—Loss before Commencement of War—Seizure by Enemy's Government of Property of its own Subject—Policy—Warranty against "Capture, Seizure, or Detention."*

Gold, the property of a mining company, which was incorporated and registered under the laws of the South African Republic and carried on its business there, was insured with the defendants against (amongst other risks) "arrests, restraints, and detainments of all kings, princes, and people" during transit from the mines in the South African Republic to the United Kingdom or France; the policy contained a warranty against "capture, seizure, and detention, and the consequences thereof." During transit the gold was taken possession of by the Government of the South African Republic on its own territory. The gold was taken in anticipation of an outbreak of war, which in fact occurred a few days afterwards, and the act of the Government in taking it was constitutional and in accordance with the law of the Republic. In an action against the underwriters:—

Held, that there had been a seizure or detention of the gold within the meaning of the warranty, and that the underwriters were therefore not liable on the policy. ROBINSON GOLD-

INSURANCE, MARINE—*continued.*
MINING COMPANY *v.* ALLIANCE INSURANCE COMPANY - - - - **Phillimore J. 919**

3. —— *Collision between Vessels, What is—Vessel Riding at Anchor—Collision with Anchor—Construction of Policy.*

A policy of marine insurance provided that the insurers would pay to the assured the amount of any damage caused to any of his tugs, "owing to actual collision between any such tug and any vessel, bridge, wharf, mooring pier, or similar structure." One of the assured's tugs, whilst coming up the river Thames, was damaged by striking upon a vessel's anchor, to which the vessel was riding attached by a chain:—

Held, that the tug had come into collision with a "vessel" within the meaning of the policy, and, therefore, that the insurers were liable. *In re* MARGETTS AND OCEAN ACCIDENT AND GUARANTEE CORPORATION, LIMITED **Div. Ct. 792**

4. —— *Disbursements, Insurance or Advances for—"Warranted free of all Average"—Loss of Ship by Perils of Sea—Obligation of Master conditional on Arrival of Ship—Pledge of Freight not conditional—Part of Freight Payable—Partial Loss.*

The captain of an Italian ship, in consideration of advances made by bankers for ship's disbursements at the port of loading, signed and indorsed to the bankers a document in the following terms: "Ten days after arrival at port of destination of the steel barque *Cinque*, of which I am master, now lying at Pensacola, Fla., and ready to sail for Southampton, I promise to pay to the order of myself the sum of 760*l.* 12*s.* 9*d.*, British sterling, in approved bankers' demand bills on London, value received for necessary disbursements of my vessel at this port, for the payment of which I hereby pledge my vessel and freight; and my consignees at the port of destination are hereby directed to pay the amount of this obligation from the first amount of freight received for account of my said vessel." The bankers effected an insurance of the advances so made against perils of the sea by a policy warranted free of all average. The ship never arrived at the port of destination, but became a constructive total loss on the voyage. Part, however, of the cargo was salved, upon which by Italian law distance freight became payable. In an action by the assured upon the policy as for a total loss:—

Held, that the pledge of freight took effect, although the ship did not arrive at the port of destination, and there was therefore not a total loss of the subject-matter of insurance, and consequently that the action on the policy was not maintainable. PRICE *v.* MARITIME INSURANCE COMPANY - - - - **C. A. 412**

5. —— *General Average Loss—Policy—Ship valued for Policy at less than Real Value—Salvage—Liability of Underwriters.*

The defendants insured the plaintiffs' ship for 33,000*l.*, at which sum the ship was valued in the policy. During the currency of the policy a general average loss was sustained, and a sum awarded in a salvage action had also to be paid.

INSURANCE, MARINE—*continued.*

In the salvage action the value of the ship was proved to be 40,000*l.*, and in the average statement that sum was taken as the contributory value of the ship, and the rights of all parties were adjusted on that footing. In an action on the policy:—

Held, that the defendants were only liable to make good to the plaintiffs thirty-three fortieths of the salvage and general average losses.

Decision of Bigham J., [1900] 2 Q. B. 748, affirmed. STEAMSHIP BALMORAL COMPANY *v.* MARTEN - - - - **C. A. 896**

6. —— *Reinsurance—Insurance of Goods—Unreasonable Delay of Voyage—Material Alteration of Risk.*

The plaintiffs, who had insured all shipments of coal by certain merchants for twelve months by a cover-note at premiums varying according to the date of sailing and port of destination, on July 30 received notice from the merchants of a proposed shipment by a certain vessel from the Tyne. The premiums payable to the plaintiffs would be 12*s.* 9*d.* for August, and 15*s.* for September. On August 2 they effected a reinsurance for 1500*l.* at a premium of 6*s.* 8*d.* with the defendant and others at Lloyd's, by a slip which named the vessel and purported to be subject to the reinsurance and deviation clauses. The vessel was then, as the underwriters ascertained, near the Tyne, but she did not sail on the proposed voyage until September 25, and was lost on October 2. The policy of reinsurance was issued on October 5, and the plaintiffs, having paid the merchants for a total loss, claimed payment from the defendant:—

Held, that the risk was materially altered by the delay of the voyage, and that the underwriters were not liable. MARITIME INSURANCE COMPANY *v.* STEARNS - - **Mathew J. 912**

7. —— *Time Policy for more than Twelve Months—Continuation Clause, Validity of—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 93.

A policy of marine insurance upon a ship for the period of twelve months contained the following clause: "Should the vessel be at sea or abroad on the expiration of this policy, it is agreed to hold her covered until arrival at her port of final destination in the United Kingdom or on the Continent of Europe at a pro ratâ daily premium." On the expiration of the twelve months the ship was abroad, and on her voyage home was lost. In an action on the policy:—

Held, that the policy was one entire contract of insurance for a time exceeding twelve months, and was consequently invalid as being in contravention of s. 93, sub-s. 3, of the Stamp Act, 1891. ROYAL EXCHANGE ASSURANCE CORPORATION *v.* SJORFORSAKRINGS AKTIEBOLAGET VEGA **Bigham J. 567**

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LANDLORD AND TENANT—*Agreement—Collateral Agreement—Parol Warranty that Drains are in order.*

The plaintiff and the defendant negotiated for the lease of a house by the latter to the former. The terms were arranged, but the plaintiff refused to hand over the counterpart that he had signed unless he received an assurance that the drains were in order. The defendant verbally represented that they were in good order, and the counterpart was thereupon handed to him. The lease contained no reference to drains. The drains were not in good order, and an action was brought to recover damages for breach of warranty:—

Held, that the representation made by the defendant as to the drains being in good order was a warranty which was collateral to the lease, and for breach of which an action was maintainable. DE LASSALLE *v.* GUILDFORD - **C. A. 215**

2. —— *Lease—Covenant by Lessee to Pay and Discharge "Impositions" charged or imposed in respect of the Premises—Order by Sanitary Authority on Lease to abate Nuisance—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76).

A lease for years contained a covenant by the lessee to "pay and discharge all taxes rates including sewers main drainage assessments and impositions whatsoever which now are or at any time hereafter during the continuance of the said term hereby granted be taxed rated assessed charged or imposed upon or in respect of the said premises or any part thereof or on the landlord tenant or occupier of the same premises by authority of Parliament or otherwise howsoever (landlord's property tax and tithe only excepted)." There was no repairing covenant in the lease. Notice was given to the lessor by the sanitary authority of the district, under the Public Health (London) Act, 1891, to abate a nuisance caused by a foul and offensive privy on the premises by removing the privy and constructing a water-closet in accordance with the by-laws of the London County Council. The lessor thereupon did the work required in the notice, and subsequently sued the lessee to recover the expense incurred in so doing:—

Held, that this expense was not covered by the words "impositions charged or imposed upon or in respect of the premises" in the covenant, and therefore that the lessee was not liable. FOULGER *v.* ARDING - - **Div. Ct. 151**

3. —— *Lease—Covenant not to Assign—Proviso for Re-entry on Bankruptcy or Breach of any Covenant—Lessee adjudicated Bankrupt on his own Petition—Forfeiture—Peaceable Re-entry by Lessor—Notice—Relief—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-ss.* 1, 2, 6—*Conveyancing Act*, 1892 (55 & 56 *Vict. c.* 13), *s.* 2, *sub-s.* 2—*Bankruptcy Rules*, 1886, *r.* 190.

A lease contained a covenant not to assign without licence, and a proviso for re-entry on bankruptcy of the lessee or breach of any covenant. The lessee having been adjudicated bankrupt on his own petition, the lessor purported to determine the lease under the proviso of re-entry, and obtained peaceable possession from the lessee without giving any notice under s. 14 of the Conveyancing Act, 1881:—

Held, that the lessor's re-entry was void as against the lessee's trustee in bankruptcy, for the statutory notice was necessary before the lessor could obtain possession either peaceably or by action:

Held, also, that the lessee's being adjudicated bankrupt on his own petition did not operate as a breach of his covenant not to assign. *In re* RIGGS. *Ex parte* LOVELL - **Wright J. 16**

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—— Lease—Trustee in bankruptcy—Disclaimer —"Unprofitable contract" — Contract for sale of lease - - - 518
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LANDS CLAUSES ACTS—*Compensation—Arbitration—Preventing the Working of Coal Mines—Notice to Treat—Rise in Value of Coal after Notice to Treat, whether Arbitrator can consider in assessing Compensation.*

In an arbitration under the Lands Clauses Acts and the Waterworks Clauses Act, 1847, to assess the compensation payable to the owner of coal mines in respect of his being prevented from working seams of coal lying under and near to the reservoir of a waterworks company, the arbitrator is entitled to take into consideration, as an element in determining the amount of compensation to be paid, a rise in the value of coal which has occurred between the date of the company's notice to treat and the making of his award. *In re* BWLLFA AND MERTHYR DARE STEAM COLLIERIES (1891), LIMITED, AND PONTYPRIDD WATERWORKS COMPANY - **Div. Ct. 798**

2. —— *Compensation — Lands Injuriously Affected—Lease of Colliery—Right of Lessee to Sink Shaft in Land of Lessor not Demised — Reasonable Approval of Lessor—Purchase by Railway Company—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 68.

A lease of a piece of land with colliery shaft, buildings, and works thereon, and of the minerals under that and adjoining land of the lessor, the surface of which was not demised by the lease, comprising together 335 acres, contained a proviso that the lessee might at any time during the term sink a pit or pits in any part of the land the surface of which was not demised, but so that the position of such pit or pits should be

LANDS CLAUSES ACTS—*continued.*

subject to the reasonable approval of the lessor, his heirs or assigns. A railway company, under the powers of a special Act incorporating the Lands Clauses Consolidation Act, 1845, purchased from the lessor five acres of the before-mentioned surface which was not demised, and occupied the same by their railway and works:—

Held, that the mere fact that the railway company had under their Act taken the five acres for the purposes of their railway was not a reasonable ground under the before-mentioned proviso in the lease for disapproval of the position of any pit proposed to be sunk therein, and that the lessee had a substantial interest under the proviso which entitled him to compensation for being prevented by the railway company's taking the land from exercising therein the right of sinking a pit given to him by the lease.

Decision of Darling and Bucknill JJ., [1900] 2 Q. B. 677, affirmed. *In re* MASTERS AND GREAT WESTERN RAILWAY COMPANY - - C. A. 84

3. —— *Notice to Treat—Interest created in other Land subsequently to Date of Notice—Right to Compensation.*

Although an interest in land the subject of a notice to treat created subsequently to the date of the notice cannot form the subject of compensation under the Lands Clauses Act, the service of the notice does not disentitle a person, who subsequently acquires an interest in other property of the owner adjoining that which is the subject of the notice, from claiming compensation in respect of injurious affection of that interest. MERCER *v.* LIVERPOOL, ST. HELEN'S AND SOUTH LANCASHIRE RAILWAY COMPANY Lord Alverstone C. J. 753

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LICENSING ACTS — *Certiorari* — *Confirming Authority, Order of* — *Justices* — *Disqualification—Bias, Likelihood of—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *ss.* 38, 43.

A writ of certiorari will lie to bring up an order of justices acting as the confirming authority under the Licensing Act, 1872.

Reg. v. *Manchester Justices*, [1899] 1 Q. B. 571, approved of.

A municipal corporation having, for the purposes of a street improvement, purchased certain premises licensed for the sale of intoxicating liquors, an agreement was entered into between the corporation and a brewery company, by which the company agreed to pay to the corporation a sum of money, in the event of a licence being granted to the company for the sale of intoxicating liquors on certain premises belonging to them, and the corporation agreed to close the before-mentioned licensed premises, and not to make, or allow to be made, any application for a renewal of the licence in respect of them.

Certain justices for the borough, who were also members of the borough council, had taken an active part in the council in support of the proposal that the above-mentioned agreement should be entered into by the corporation. These justices subsequently sat on the hearing of an application to the licensing committee on behalf of the brewery company for a licence in respect of their before-mentioned premises, which was granted. On the application to the confirming authority under the Licensing Act, 1872, for confirmation of the grant of the licence to the company, the same justices again sat to hear the application, which was granted. On an application for a certiorari to bring up and quash the order confirming the grant of the licence:—

Held, that, there being a real likelihood of bias on the part of the before-mentioned justices with regard to the subject-matter of the application to the confirming authority, the writ of certiorari must be issued. THE KING *v.* SUNDERLAND JUSTICES - - - C. A. 357

2. —— *General Annual Licensing Meeting—Adjournments—Power of Justices to Adjourn into October—Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 3 *—Wine and Beerhouse Act*, 1870 (33 & 34 *Vict. c.* 29), *s.* 11.

Where a full licence to sell intoxicating liquors, under 9 Geo. 4, c. 61, is applied for at an adjourned general annual licensing meeting held in September, the justices have no power to adjourn that meeting to a date after the end of September in order to allow the applicant, who has not given sufficient notice of his application, to give fresh notices. THE KING *v.* GROOM. *Ex parte* COBBOLD - - - Div. Ct. 157

3. —— *Licence—Renewal—Value of Premises —Objection—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 45.

In order to justify an objection to the renewal of a beerhouse licence on the ground that the premises are not of the annual value required by s. 45 of the Licensing Act, 1872, it must be shewn that the premises were not at the date of the passing of that Act licensed for the sale of intoxicating liquor for consumption thereon. IGOE *v.* SHANN - - - Div. Ct. 740

LICENSING ACTS—*continued.*

—— Brewery business — Income tax — Deductions—Expenses of applications for new licences - - - - **349**
See REVENUE. 3.

LIEN—On shares—Set-off against debts due from member—Winding-up - **477**
See INDUSTRIAL AND PROVIDENT SOCIETY.

LIMITATION—Heirs "and assigns" of survivor
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LIMITATIONS, STATUTES OF—*Land Tax—Redemption—Interest, Recovery of—Lapse of Time*—42 *Geo.* 3, *c* 116, *s.* 123—3 *& 4 Will.* 4, *c.* 27, *s.* 1 — *Real Property Limitation Act*, 1874 (37 *& 38 Vict. c.* 57), *ss.* 1, 8.

The yearly sum payable, under s. 123 of 42 Geo. 3, c. 116, by way of interest on the sum paid as a consideration for the redemption of land tax, is "rent" within the meaning of s. 1 of the Real Property Limitation Act, 1874; so that an action to recover the same is barred unless it is brought within the times limited by s. 1 in respect of actions to recover any land or rent. SKENE *v.* COOK - - - **Div. Ct. 7**

2. —— *Mortgagee—Real Property—Entry or Action within Twelve Years after last Payment of Interest — Real Property Limitation Act*, 1837 (7 *Will.* 4 *and* 1 *Vict. c.* 28).

The Real Property Limitation Act, 1837, which provides that a person entitled to or claiming under a mortgage of land may make an entry or bring an action at law or suit in equity to recover such land at any time within twenty [now twelve] years next after the last payment of any part of the principal or interest secured by such mortgage, applies, not only as against the mortgagor and persons claiming under him, but also as against a person who has acquired a good title by virtue of the Statute of Limitations as against the mortgagor and those claiming under him. LUDBROOK *v.* LUDBROOK - **C. A. 96**

—— London building—Fees of district surveyor—Liability—Period of limitation **278**
See LONDON. 1.

—— Rates, Recovery of—Limitation of time—"Complaint" - - - **26**
See RATES. 2.

LOCAL GOVERNMENT—*Justices—Justices' Clerk—Power to Appoint—Payment of Salary—Fines and Fees payable to County Treasurer—Borough without Separate Commission of the Peace—Justices Clerks Act*, 1877 (40 *& 41 Vict. c.* 43), *s.* 5—*—Municipal Corporations Act*, 1882 (45 *& 46 Vict. c.* 50), *ss.* 154–159.

Courts of petty sessions cannot be held for a borough without a separate commission of the peace except as courts for the petty sessional division in which the borough is situate.

A separate clerk cannot be appointed by the justices usually acting in a borough in which petty sessions are so held, but the justices of the petty sessional division may appoint a separate clerk in respect of each place appointed for holding petty sessions in the division, under s. 5 of the Justices Clerks Act, 1877.

The salary of every clerk so appointed is payable by the county council; and the unappropriated fines and fees must be paid to the county treasurer. HUNTINGDON CORPORATION *v.* HUNTINGDON COUNTY COUNCIL - **Div. Ct. 257**

LOCAL GOVERNMENT—*continued.*

—— Burial board, Transfer of powers of—Expenses—Rates - - - **174**
See BURIAL.

—— Carriage plying or driven for hire—Concealment of number-plate - - **169**
See HACKNEY CARRIAGE.

—— Drainage of new house—Separate drains for sewage and surface water—Discretion of urban council - - - **540**
See SEWERS.

—— Dwelling-house unfit for human habitation—Closing order - - - **265**
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—— London building—Fees of district surveyor—Liability—Period of limitation **278**
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—— Nuisance—Abatement—Owner—Default—Jurisdiction of justices to make order on person who has ceased to be owner **274**
See NUISANCE. 1.

—— Sanitation—House let in lodgings or occupied by members of more than one family - - - - **285**
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—— Streets—Name put up by local authority—Removal by owner - - **180**
See STREETS.

—— Way—Public right of—Removal of obstruction by private individual—Costs **268**
See WAY, RIGHT OF.

LOCUS STANDI — Lunatic debtor — English lunacy — Committee — Curator bonis — Scottish jurisdiction—Bankruptcy proceedings - - - - **32**
See BANKRUPTCY. 3.

LONDON—*Buildings—Fees of District Surveyor—Liability of Builder, Owner, or Occupier—Period of Limitation—Local Government—London Building Act*, 1894 (57 *& 58 Vict. c. cxiii.*), *ss.* 154, 157—*Summary Jurisdiction Act*, 1848 (11 *& 12 Vict. c.* 43), *s.* 11.

By s. 157 of the London Building Act, 1894, it is enacted that at the expiration of fourteen days after the roof of any building surveyed by a district surveyor has been covered in he shall be entitled to receive the fees due to him from the builder or from the owner or occupier of the building, and if any such builder, owner, or occupier refuses to pay the fees, they may be recovered in a summary manner on its being shewn to the satisfaction of the Court that a proper bill specifying the amount of the fees was delivered to him:—

Held, that the period of limitation fixed in such a case for taking proceedings by s. 11 of the Summary Jurisdiction Act, 1848, does not begin to run until the bill has been delivered to the party from whom the fees are sought to be recovered in a summary manner. CORBETT *v.* BADGER - - - - **Div. Ct. 278**

2. —— *Buildings—Part of Building used for Purposes of Trade, Part for Dwelling-house—*

LONDON—*continued.*

London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 74, *sub-s.* 2.

In a special case stated by a metropolitan police magistrate upon an objection raised by a district surveyor that s. 74, sub-s. 2, of the London Building Act, 1894, applied to a building about to be erected as a beerhouse, the magistrate found as a fact that the basement and ground-floor of the building were intended to be used for the purpose of the trade of a beerhouse, and that the part above the ground-floor was intended to be used as a dwelling-house for the licensed occupier; but he held that the case was governed by the decision in *Carritt* v. *Godson*, [1899] 2 Q. B. 193, and overruled the objection of the district surveyor. The decision of the magistrate was affirmed by a Divisional Court. On appeal:—

Held, that the question whether the building was within s. 74, sub-s. 2, of the Act was concluded by the finding of fact in the case at bar, which was binding on the Court.

Judgment of the Divisional Court, [1901] 2 K. B. 122, reversed. DICKSEE *v.* HOSKINS C. A. 660

3. —— *Buildings—Theatres and Music Halls—Structural Defects causing Danger from Fire—Notice to Remedy—Compliance—Power to give subsequent Notice—Metropolis Management and Building Act*, 1878 (41 & 42 *Vict. c.* 32), *s.* 11.

Where a notice has been served upon the owner of a building, under s. 11 of the Metropolis Management and Building Act, 1878, requiring him to remedy structural defects from which special danger from fire may result, and the requirements of that notice have been complied with, there is no power subsequently to serve another notice under that section in respect of the same building. ST. JAMES'S HALL COMPANY *v.* LONDON COUNTY COUNCIL - Channell J. 250

—— Covenant by lessee to pay and discharge "impositions" — Nuisance — Sanitary authority - - - - 151
See LANDLORD AND TENANT. 2.

—— Nuisance—Black smoke—Evidence - 186
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—— Sanitation—House let in lodgings or occupied by members of more than one family
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LUNACY — Bankruptcy proceedings — Curator bonis — Scottish jurisdiction — Locus standi—English lunacy - - 32
See BANKRUPTCY. 3.

MACHINERY—Injury to workman—"Machinery or plant" - - - - 483
See EMPLOYER AND WORKMAN. 3.

MALICE—Evidence of—Libel—Privileged communication—Publication—Post-card 1
See DEFAMATION. 1.

MARINE INSURANCE.
See Cases under INSURANCE, MARINE.

MARRIAGE SETTLEMENT — Stamp — Exemption—Power of appointment - 342
See REVENUE. 9.

MARRIED WOMAN—Costs—Liability to—"Proceeding instituted"—Interpleader proceedings - - - - 487
See HUSBAND AND WIFE.

MASTER AND SERVANT—*Agreement to engage and employ Servant—Refusal to provide Servant with Work—Breach of Contract.*

The defendants agreed to engage and employ the plaintiff as their representative salesman for a period of four years. Before the expiration of that time the defendants, though willing to continue to pay wages to the plaintiff, refused to give him any work to do as their representative salesman. In an action to recover damages for breach of contract:—

Held, that there was no obligation on the defendants to provide the plaintiff with work. TURNER *v.* SAWDON & Co. - - C. A. 653

2. —— *Negligence of Servant—Servant of one Person lent to another—Control of Servant.*

A company, which carried on the business of iron-founders, entered into a written contract with the defendant for the hire from him of a van, horse, and driver, for the purpose of delivering goods to their customers. The contract provided that the defendant was to supply a capable man to drive and take charge of the van and horse, that the man in defendant's employ, and all charges and claims whatsoever in reference to the van, horse, and man were to be paid for by the defendant, who was to be responsible for the same, and that the company were only to be responsible for the payment for the van, horse, and man at a certain rate per annum by monthly payments. The driver of a van supplied to the company by the defendant under the above-mentioned contract was guilty of negligence when delivering a girder at the premises of a customer of the company, by which the plaintiff, a servant of the customer, was injured. There was no evidence that any one representing the company exercised any control over the driver in respect of the delivery of goods for the company:—

Held, that, upon the true construction of the contract, the implication was that the control of the driver, when delivering goods for the company, remained in the defendant, and that the defendant was therefore liable for his negligence. WALDOCK *v.* WINFIELD - - C. A. 596

—— Seduction—Evidence of service — Weekly leave of absence - - - - 722
See SEDUCTION.

—— Workmen's Compensation Act.
See Cases under EMPLOYER AND WORKMAN.

MAYOR—Election of—Validity of vote of disqualified person—Right of chairman to vote—Casting vote - - - 75
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MEASURES—Weights and - - - 117
See WEIGHTS AND MEASURES.

MERCHANT SHIPPING — Accommodation for seamen—Lascars - - - 683
See SHIPPING. 4.

—— Offences—Foreign ship, Persuading seaman to desert from - - - 573
See SHIPPING. 3.

METROPOLIS.
See LONDON.

MILK—Adulteration - - 817, 825
See ADULTERATION. 2, 4.

MINES—Colliery—Right of lessee to sink shaft in land of lessor not demised—Purchase by railway company - - 84
See LANDS CLAUSES ACTS. 2.

—— Compensation—Rise in value of coal after notice to treat, whether arbitrator can consider in assessing compensation 798
See LANDS CLAUSES ACTS. 1.

MONEY-LENDERS—*Reopening of Transaction—"Harsh and Unconscionable Transaction"—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 1.

By s. 1, sub-s. 1, of the Money-lenders Act, 1900, where proceedings are taken in any court by a money-lender for the recovery of money lent after the commencement of the Act, and there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, and that, in either case, the transaction is "harsh and unconscionable, or is otherwise such that a Court of Equity would give relief," the Court may reopen the transaction and give relief to the person sued:—

Held, that the words "or otherwise is such that a Court of Equity would give relief" are not exclusive of the words "harsh and unconscionable," and that in order to entitle the person sued to relief the transaction must be such that a Court of Equity would relieve against it on the ground of its being harsh and unconscionable. WILTON & Co. *v.* OSBORN - - Ridley J. 110

MORTGAGE—*Clog on Redemption—Mortgage of Shares in Company—Stipulation that Mortgagee shall be employed as Broker by the Company.*

In consideration of an advance of money to the defendant by the plaintiff, the defendant, who was the holder of shares in a tea company to an amount which gave him a preponderating voice in the affairs of the company, mortgaged these shares to the plaintiff to secure the advance, and agreed that always thereafter he would use his best endeavours to secure that the plaintiff should be employed for the sale of the company's teas as broker, and, in the event of any of the company's teas being sold otherwise than through the plaintiff, he would pay to the plaintiff the amount of the commission which the plaintiff would have earned if the teas had been sold through him:—

Held, that this agreement was not invalid as being a clog upon the equity of redemption in the shares. CARRITT *v.* BRADLEY - C. A. 550

—— Lease—Disclaimer by trustee of bankrupt assignee—Mortgage by sub-demise—Vesting order - - - 628
See BANKRUPTCY. 2.

—— Real property limitation—Mortgagee—Entry or action within twelve years after last payment of interest - - 96
See LIMITATIONS, STATUTES OF. 2.

MUNICIPAL CORPORATION.
See CORPORATION.

MUSIC HALL—Buildings—Structural defect—Notice to remedy—Compliance - 250
See LONDON. 3.

NAME—Street—Name put up by local authority—Removal by owner - - 180
See STREETS.

NEGLIGENCE—*Alien—Compensation for Death—Negligence of British Subject—Cause of Action arising on High Seas—Fatal Accidents Acts*, 1846 *and* 1864 (9 & 10 *Vict. c.* 93; 27 & 28 *Vict. c.* 95).

The Fatal Accidents Acts, 1846 and 1864, apply as well for the benefit of the representatives of a deceased foreigner as for those of a British subject, at all events as against an English wrong-doer.

A collision occurred upon the high seas between a British and a foreign ship owing to the negligence of those in charge of the former. As a result of the collision a foreign seaman on board the foreign ship was drowned:—

Held, that the personal representative of the deceased seaman had a right of action by the said Acts against the owners of the British ship. DAVIDSSON *v.* HILL - - - Div. Ct. 606

2. —— *Nervous Shock resulting from Fright—Remoteness of Damage.*

Damages which result from a nervous shock occasioned by fright unaccompanied by any actual impact may be recoverable in an action for negligence if physical injury has been caused to the plaintiff.

Victorian Railways Commissioners v. *Coultas*, (1888) 13 App. Cas. 222, not followed. DULIEU *v.* WHITE & SONS - - - Div. Ct. 669

—— Passenger—Closing of carriage door - 322
See RAILWAY.

—— Servant of one person lent to another—Control of servant - - - 596
See MASTER AND SERVANT. 2.

NERVOUS SHOCK—Resulting from fright—Remoteness of damage - - 669
See NEGLIGENCE. 2.

NEW TRIAL—Application for—Power to enter judgment—Jurisdiction - - 325
See COUNTY COURT. 2.

NOTICE—Lease—Disclaimer by trustee of bankrupt assignee—Mortgage by sub-demise—Vesting order - - - 628
See BANKRUPTCY. 2.

—— Priority—Same debt assigned to different persons—Notice to debtor - 829
See ASSIGNMENT.

—— Statutory defence—Gaming and wagering contract - - - - 195
See COUNTY COURT. 4.

—— Theatres and music halls—Structural defects—Notice to remedy—Compliance
See LONDON. 3. 250

—— To treat—Interest created in other land subsequently to date of notice—Right to compensation - - - 753
See LANDS CLAUSES ACTS. 3.

NUISANCE — *Abatement — Owner — Default — Jurisdiction of Justices to make Order on Person who has ceased to be Owner—Local Government—*

NUISANCE—*continued.*

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 94, 95, 96, 98, 104.

A local authority took proceedings under the Public Health Act, 1875, against the agent of the owner of certain property for the abatement of a nuisance. The justices held that the respondent was not the owner within the meaning of the Act, and dismissed the summons. Their decision was reversed by the Divisional Court and the case remitted to them. At the second hearing it appeared that the respondent had resigned the agency since the first hearing, and the justices again dismissed the summons:—

Held, that the justices had jurisdiction to make an order on the respondent requiring him to abate the nuisance, although he was no longer the agent of the owner of the property. BROADBENT *v.* SHEPHERD - - - **Div. Ct. 274**

2. —— *Black Smoke—Evidence—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 24 (*b*).

By s. 24, sub-s. (*b*), of the Public Health (London) Act, 1891, "Any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance" is a nuisance liable to be dealt with summarily under the Act.

Upon the hearing of complaints under this section it was proved that black smoke issued from a chimney several times a day during a series of days for periods varying from a few minutes to upwards of an hour:—

Held, that upon these facts the magistrate was justified in finding that the smoke issued in such quantity "as to be a nuisance," although there was no evidence that any particular person or property was injuriously affected thereby. SOUTH LONDON ELECTRIC SUPPLY CORPORATION *v.* PERRIN - - - - **Div. Ct. 186**

—— Covenant by lessee to pay and discharge "impositions" — Order by sanitary authority on lessee to abate nuisance **151**
See LANDLORD AND TENANT. 2.

OBSTRUCTION—Way, Public right of—Removal of obstruction by private individual—Costs - - - - **268**
See WAY, RIGHT OF.

OFFENCES—Conviction—Continuing offence—Averment of commission of offence on several discontinuous days - **458**
See CRIMINAL LAW. 3.

—— Merchant Shipping Acts—Foreign ship, Persuading seaman to desert from **579**
See SHIPPING. 3.

OYSTERS—Laying oysters on foreshore to get rid of impurities - - - **870**
See FISHERY. 2.

PARENT AND CHILD—*Illegitimate Child—Void Contract—Contract by Mother to give up Possession of Child—Contract to relieve Mother of Responsibility for Maintenance of Child.*

A contract between the mother of an illegitimate child and another person for the transfer to that person of the rights and liabilities of the mother in respect of the child is invalid. HUMPHRYS *v.* POLAK AND WIFE - **C. A. 385**

PAROL WARRANTY—That drains are in order—Collateral agreement - - **215**
See LANDLORD AND TENANT. 1.

PARTICULARS—Directors' liability—Statements in prospectus—"Reasonable ground to believe" - - - - **576**
See PRACTICE. 7.

PARTNERSHIP—Debt due to firm—Assignment by one partner by deed—Validity—Priority - - - - **829**
See ASSIGNMENT.

PASSENGER—Negligence—Closing of carriage door - - - - - **322**
See RAILWAY.

PAWNBROKER—*Illegal Pawn of Chattel—Pawner convicted of stealing the Chattel—Subsequent Prosecution by Pawnbroker for illegal Pawning—Pawnbrokers Act*, 1872 (35 & 36 *Vict. c.* 93), *s.* 33.

The conviction of a person for larceny of a chattel is no bar to his subsequent prosecution, under s. 33 of the Pawnbrokers Act, 1872, for illegally pawning the chattel which he had stolen. PICKFORD *v.* CORSI - - **Div. Ct. 212**

PENALTY—Advertisement of reward for return of stolen property—Dog—"Any property whatsoever" - - - **564**
See CRIMINAL LAW. 1.

PERFORMANCE—Impossibility of—Contract—Implied condition—Cargo to be shipped by specified ship - - - **126**
See CONTRACT. 2.

PLEDGE—Of freight not conditional—Part of freight payable—Partial loss - **412**
See INSURANCE, MARINE. 4.

POLICY—Declaration of war—Seizure by enemy's Government of things insured—Validity of insurance—Public policy - **849**
See INSURANCE.

—— Marine insurance.
See Cases under INSURANCE, MARINE.

POOR-RATE.
See RATES.

POSSESSION—Bill of sale—Registration not renewed—Apparent possession - **589**
See BILL OF SALE.

—— Larceny—Deer usually kept in a forest—Killing outside forest—Unlawful possession - - - - **531**
See CRIMINAL LAW. 2.

POST-CARD—Libel—Privileged communication—Publication—Evidence of malice **1**
See DEFAMATION. 1.

POWER OF APPOINTMENT—Stamp—Settlement—Exemption - - - **342**
See REVENUE. 9.

PRACTICE—*Costs—Action for Libel—Pleas of Justification and Privilege—Defendant successful on one and unsuccessful on the other—Costs of Witnesses relating exclusively to Plea on which Defendant unsuccessful.*

Where in an action for libel pleas of justification and privilege are set up, and the defendant fails to establish the plea of justification, and

PRACTICE—*continued.*

judgment is given for him on the plea of privilege, the plaintiff is not entitled to the costs of witnesses whose evidence does not relate exclusively to the plea of justification. BROWN *v.* HOUSTON - - - - - **C. A. 855**

2. —— *Costs—Action of Contract against two Defendants—Separate Causes of Action—Judgment for 50l. against both Defendants, and for more than 50l. against one Defendant—County Courts Act*, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 116—*Rules of Supreme Court, Order* LXV., *r.* 12.

The defendants B. and R. entered into a joint and several bond in 50*l.* to the plaintiffs, who were the trustees of a friendly society, to secure the fidelity of the defendant B., who was the treasurer of the society. B. having failed to account for 90*l.*, the plaintiffs brought an action in the High Court against both defendants, in which they recovered judgment for 50*l.* against both defendants and for 90*l.* against the defendant B., with costs against the defendant B. and such costs against the defendant R. as they were entitled to. The judge who tried the case having refused to certify that the case was fit to be tried in the High Court:—

Held, that as against the defendant R. the plaintiffs were only entitled to costs on the county court scale. DUXBURY *v.* BARLOW AND RICHARDSON - - - - - - **C. A. 23**

3. —— *Costs, Security for—Workmen's Compensation Act*, 1897 (60 *&* 61 *Vict. c.* 37)—*Appeal from County Court.*

An appeal against a decision of a county court judge upon an application for compensation under the Workmen's Compensation Act, 1897, is not in the nature of a motion for a new trial, and the appellant can be ordered to give security for the costs of the appeal. *In re* HARWOOD AND ABRAHAMS - - - - - **C. A. 304**

4. —— *Costs—Taxation—Guardian ad litem—Official Solicitor—Solicitor and Client or Party and Party Taxation—Infant—Rules of Supreme Court, Order* LXV., *r.* 13.

An action for a tort having been brought against an infant, no appearance was entered for him, and on the plaintiff's application the official solicitor was assigned guardian ad litem to the defendant, and he delivered a defence on behalf of the defendant. At the trial the issues were found by the jury in favour of the plaintiff with 450*l.* damages, and judgment was entered for him accordingly; and it was ordered that the plaintiff should pay the costs of the official solicitor, as guardian ad litem of the defendant, to be taxed by the master:—

Held, that there being in the order no special direction to the contrary, rule 13 of Order LXV. did not apply, and the costs must be taxed as between party and party.

Decision of Grantham J. reversed. EADY *v.* ELSDON - - - - - - **C. A. 460**

5. —— *Costs—Taxation—Witness—Examination before Examiner—Depositions not used at the Trial—"Costs in the Action"—Allowing Costs of unused Depositions or Proceedings—Taxing Master—Discretion—Rules of Supreme Court*, 1883, *Order* XLV., *r.* 27 (29).

In the taxation of the costs of an action in which the examination of a witness under the common order before trial has not been used at the trial for some reason, such as the attendance of the witness at the trial or the taking of a judgment by consent, the costs of the examination should not be disallowed under Order LXV., r. 27 (29), merely on the ground that the use of the examination had become unnecessary. The true test in exercising the discretion given to the taxing master by the rule is whether the costs of the examination were "necessary or proper for the attainment of justice" under the circumstances existing at the time the examination was ordered, irrespective of the eventual state of circumstances at the trial.

There is no hard and fast rule of taxation that the costs of a proceeding should not be allowed unless it has been actually used for some purpose.

Delaroque v. *S. S. Oxenholme & Co.*, [1883] W. N. 227, approved.

Ridley v. *Sutton*, (1863) 1 H. & C. 741; 32 L. J. (Ex.) 122, disapproved. BARTLETT *v.* HIGGINS - - - - - **C. A. 230**

6. —— *Discovery—Affidavit of Documents—Further Affidavit—"Specific Documents"—Rules of Supreme Court, Order* XXXI., *r.* 19A (3).

To justify an application for discovery of documents under rule 19A (3) of Order XXXI., the party making the application must in his affidavit name and specify, so that they can be identified, the particular documents of which he desires discovery.

It is not sufficient to make a general affidavit based on a priori reasoning that certain classes of documents must be in his opponent's possession or power.

The discovery sought must be of a species, not a genus. WHITE *v.* SPAFFORD & Co. **C. A. 241**

7. —— *Particulars—Directors' Liability—Statements in Prospectus—"Reasonable Ground to believe" Truth of Statements—Directors' Liability Act*, 1890 (53 *&* 54 *Vict. c.* 64), *s.* 3—*Rules of Supreme Court, Order* XIX., *r.* 6.

In an action against directors of a company claiming compensation under the Directors' Liability Act, 1890, in respect of untrue statements contained in the prospectus of the company, the defendants by their defence said that they bonâ fide believed the statements to be true, and that they had reasonable grounds for their belief:—

Held, that the defendants must deliver particulars of the grounds of their belief.

Decision of Day J. reversed. ALMAN *v.* OPPERT - - - - - **C. A. 576**

—— Conviction — Continuing offence — Averment of commission of offence on several discontinuous days - - **458**
See CRIMINAL LAW. 3.

—— County courts.
See Cases under COUNTY COURT.

—— Summons for directions—Consent of Court in Lunacy to bankruptcy proceedings
See BANKRUPTCY. 3. **32.**

PREFERENCE — Fraudulent — Winding-up — Powers of committee - - 477
See INDUSTRIAL AND PROVIDENT SOCIETY.

PREROGATIVE—Crown—Servants of the Crown —Contracts—Liability to be sued 781
See CROWN.

PRESCRIPTION — *Drain — Acquisition of Easement by Public—Highway Act*, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 67.

The highway authority of a rural district had for upwards of twenty years maintained a pipe running from a highway through a bank which divided the highway from the defendant's land adjoining, and had during that period caused the rain water collecting upon the highway to be discharged through the pipe on to the defendant's land. The water on leaving the pipe did not fall into any channel, but simply spread over the surface of the land. The defendant having obstructed the pipe, the highway authority and the Attorney-General claimed an injunction to restrain the defendant from continuing the obstruction on the grounds: first, that from their long enjoyment of the pipe it ought to be inferred that the highway authority had by agreement with the owner of the adjoining land acquired a right to keep open the pipe under s. 67 of the Highway Act, 1835; and, secondly, that the public, as occupiers of the surface of the highway for the statutory period, had acquired a prescriptive right to the easement of discharging the water on to the defendant's land:—

Held, (1) that the pipe, being unconnected with any outfall channel, was not a drain within the meaning of s. 67 of the Highway Act, and that that section had consequently no application; and (2) that the public right of passage was not such a right as was capable of having the easement claimed attached to it. ATTORNEY-GENERAL AND BROMLEY RURAL DISTRICT COUNCIL *v.* COPELAND - - - Lord Alverstone C.J. 101

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—— Signature of party to be charged—"Person" —Corporation—Signature by agent of company - - - - 560
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PRIVILEGE—Libel—Privileged communication —Publication—Post-card—Evidence of malice - - - - 1
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PRIVITY OF CONTRACT—Broker, Default of— Liability of client to jobber - 53
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—— Broker including several orders in one contract—Liability of principal to jobber
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—— Broker including several orders in one contract—Usage of Stock Exchange 726
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PROHIBITION — *Consistory Court — Patent of Commissary and Vicar General—Reservation to*

PROHIBITION—*continued.*

Bishop of certain Causes — Questions of Procedure not affecting Jurisdiction.

By letters patent appointing a Chancellor for a diocese, the bishop gave him power to determine certain causes, "Nevertheless first consulting us and our successors, and having our consent in case either party earnestly crave our judgment." A suit was promoted for the removal of certain ornaments from a church in the diocese, and the respondents in their reply asked that the bishop should be first consulted and his consent had, and earnestly craved his judgment. The Chancellor heard the suit and pronounced an order, in which it did not appear that he had first consulted the bishop or had his consent. On an application for a writ of prohibition:—

Held, that there was not such a defect of jurisdiction apparent on the record as would justify the issue of the writ, but that if there was any defect it was in the procedure of the Court, and was the proper subject of appeal. THE KING *v.* DR. TRISTRAM AND DAVEY Div. Ct. 141

—— Affidavit, Insufficiency of—Waiver—Application for judgment summons—Jurisdiction - - - - 833
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—— Sanitation—House let in lodgings or occupied by members of more than one family - - - - 285
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PUBLIC POLICY—Capture—Loss before commencement of war—Seizure by enemy's Government of property of its own subject - - - - 419
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—— Insurance of products of mine in foreign country—Declaration of war—Seizure by enemy's Government of things insured—Validity of insurance - 849
See INSURANCE.

PUBLICATION—Libel—Privileged communication—Post-card—Evidence of malice 1
See DEFAMATION. 1.

RAILWAY—*Passenger—Closing of Carriage Door—Negligence.*

Where a passenger is seated in a railway carriage, the fact that his finger is crushed owing to the shutting of the carriage door by a railway servant on the platform is not evidence of negligence in an action against the railway company.

There is no duty cast upon the servants of a railway company to give warning of the shutting of a carriage door to passengers who are actually seated inside the carriage and are not in the act of getting in or out of it. DRURY *v.* NORTH EASTERN RAILWAY COMPANY - Div. Ct. 322

—— Colliery—Right of lessee to sink shaft in land of lessor not demised—Purchase by railway company - - 84
See LANDS CLAUSES ACTS. 2.

—— Signal-box—Poor-rate assessment - 189
See RATES. 1.

RATES—*Railway—Indirectly productive Portion of—Signal-box—Poor-rate—Assessment.*

The signal-boxes of a railway are for purposes of parochial rating to be treated, not as part of the running line, but as part of the indirectly productive portion of the railway, and are consequently to be separately assessed in the respective parishes in which they are situate. MIDLAND RAILWAY COMPANY *v.* PONTEFRACT ASSESSMENT COMMITTEE - - - - Div. Ct. 189

2. —— *Recovery of Rates—Limitation of Time—"Complaint"—Justices—Practice—Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 11.

The occupiers of a rateable hereditament, which had been assessed to certain poor-rates and general district rates upon the rateable value in the valuation list then in force, appealed against the poor-rates. Before the appeal was heard, payment of the general district rates was demanded by the local authority, and a sum was paid and accepted on account of each of those rates. The rateable value of the premises in the valuation list having been reduced as a result of the appeal, the figures of the general district rates already made were altered in the rate-book, and payment was demanded of the balance owing of the rates so reduced. Payment having been refused, a summons to enforce payment was issued at a date which was more than six months after the demand of the original amount of the rate, but within six months of the demand of the balance of the rate as amended:—

Held, that the matter of complaint, within the meaning of s. 11 of the Summary Jurisdiction Act, 1848, was the non-payment of the balance of the rates as amended, that it had therefore arisen within six months of the issue of the summons, and that the right of the local authority to recover

RATES—*continued.*

the balance was not barred by the provisions of that section. KEETON *v.* SHEFFIELD COAL COMPANY - - - - - Div. Ct. 26

3. —— *Waterworks — Indirectly-productive Works—Right to take Water from River—Assessment of Intake—Poor-rate.*

A waterworks company acquired by Act of Parliament the right to take water from a river upon payment to the conservators of the river of certain sums of money. In exercise of that right they received a flow of water from the river over a piece of land on the river bank in their occupation called an "intake." The company were rated to the relief of the poor in respect of the intake upon an assessment which included, not merely the value of the land and cost of construction of the building upon it, but also the value of the right to take water from the river which was enjoyed in connection with it, which value was represented by the sums paid to the conservators:—

Held, that the assessment was wrong, and that for the purpose of arriving at the rateable value of the intake the value of the right to receive the water could not be taken into consideration.

Liverpool Corporation v. *Llanfyllin Assessment Committee*, [1899] 2 Q. B. 14, distinguished. NEW RIVER COMPANY *v.* HERTFORD UNION Div. Ct. 620

—— Burial board—Transfer of powers of—Expenses—Poor-rate—General district rate
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REAL PROPERTY LIMITATION ACTS.
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RECEIPT—Judgment debt—Joint and several debt—Release to one co-debtor—Extinguishment of debt - - - 642
See ACCORD AND SATISFACTION.

RECEIVING ORDER—Jurisdiction to rescind—Abuse of process of Court - - 39
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RELEASE—Judgment debt—Joint and several debt—Release to one co-debtor—Extinguishment of debt - - - 642
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REMITTED ACTION—Invalid order to remit not appealed against—Objection to jurisdiction at trial—Prohibition - - 380
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REVENUE—*Corporation Duty—Real Property—Principle of Assessment—"Annual Value, Income, or Profits"—Customs and Inland Revenue Act*, 1885 (48 & 49 *Vict. c.* 51), *s.* 11.

Sect. 11 of the Customs and Inland Revenue Act, 1885, imposes on bodies corporate or unincorporate, in respect of all real and personal property belonging to them, a duty payable yearly at the rate of 5 per cent. upon "the annual value, income, or profits of such property after deducting therefrom all necessary outgoings, including the receiver's remuneration, and costs, charges, and expenses properly incurred in the management of such property."

The Surrey County Cricket Club, an unincorporated body of persons, were possessed of real and personal property, the real property consisting of a building and land in the metropolis held under a lease for years and used by them for the purposes of a cricket club. Their receipts included large sums in respect of gate-money and other payments received from persons admitted to view the cricket matches played on the ground. The club was carried on at a profit:—

Held, that the gate-money and other payments received from the public were not "annual value, income, or profits of the property" within the meaning of s. 11; that the annual value of the real property should be arrived at in the same way as upon an assessment of annual value made for the purposes of the property tax under Sched. A of the Income Tax Act (16 & 17 Vict. c. 34), and that the club were entitled to include the estimated cost of repairs as a permissible deduction from that annual value. *In re* SURREY COUNTY CRICKET CLUB - - Div. Ct. 400

REVENUE—*continued.*

2. —— *Estate Duty — Property passing on Death of Deceased—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1.

A testator who died before the commencement of the Finance Act, 1894, by his will bequeathed his real and personal estate to trustees for sale and investment, and for payment out of the annual income thereof of an annuity to his wife, and, subject to the annuity, to his eight children equally, and after the death of his wife to divide the trust fund among the children in equal shares; but if the fund exceeded a certain specified sum, then to divide eight-ninths of such excess among the children, and to pay the remaining ninth to certain other persons. The wife died after the Finance Act, 1894, had come into operation:—

Held, that estate duty was only payable on the one-ninth share of the excess of the trust fund over the specified sum and on the benefit which accrued to the children by the cesser of the annuity, since that was the only property passing on the death of the wife. *In re* TOWNSEND - - - - - Div. Ct. 331

3. —— *Income Tax—Deductions—Balance of Profit—Brewery Business—Expenses of Applications for New Licences—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D.*

The respondents, a brewing company, with the view of increasing their trade, were in the habit of making applications to the licensing justices for new licences to houses owned by them or in which they were interested. It was the practice of the licensing justices to require the applicant for a new licence to offer to surrender an existing licence as a preliminary to the grant of a new one; and in order to meet this requirement the respondents were in the habit of paying certain annual sums to the holders of certain existing licences for the right to call for a surrender of those licences if the justices required it. The sums so paid, together with the other expenses incidental to their applications for new licences (such as law costs and the cost of printing and advertising), the respondents claimed, in those cases in which their applications for new licences were unsuccessful, to deduct as a necessary annual trade expense in the computation of their profits and gains in their trade as brewers for the purposes of income tax:—

Held, that the sums so expended were employed as capital in the trade, and that the deduction consequently could not be allowed. SOUTHWELL *v.* SAVILL BROTHERS, LIMITED Div. Ct. 349

4. —— *Income Tax—Prohibition—Jurisdiction of Commissioners for District—Trade carried on partly in Great Britain—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *ss.* 106, 108, 111–117.

An English company, incorporated under the Companies Acts, had its registered office in the district of Clerkenwell, and there carried on a

business, in respect of the profits of which they were chargeable to income tax under Sched. D by the Commissioners for that district. For the purpose of the assessment of the company in respect of their profits, the Commissioners drew the inferences of fact that, having regard to the relations existing between the company and an American company trading at Rochester in the United States, the bulk of the shares in which was held by the English company, the business and profits of the American company were technically the business and profits of the English company, that the head, seat, and directing power of the company were at the registered office in London, and that, if the profits of the business carried on at Rochester were technically the profits of the American company, that company was for all purposes the agent of the English company. The English company applied for a writ of prohibition to the Commissioners to prohibit them from assessing that company in respect of the profits of the American company, on the ground that the business of the American company was not in truth the business of the English company, and that the Commissioners therefore had not, and could not by an erroneous decision on the facts give themselves, jurisdiction to assess the English company in respect of the profits of that business:—

Held, that, the Commissioners having jurisdiction under the Income Tax Act, 1842, s. 106, to assess the English company to income tax in respect of profits of a business, carried on either wholly or in part only in Great Britain, they had for the purposes of that assessment jurisdiction to decide all questions of fact necessary for ascertaining the amount of those profits, and therefore prohibition would not lie, the proper remedy, if the decision of the Commissioners were wrong in point of law, being by appeal upon a case stated. THE KING *v.* GENERAL COMMISSIONERS OF TAXES FOR THE DISTRICT OF CLERKENWELL - - - - C. A. 879

5. —— *Income Tax—Public Office or Employment of Profit—Incumbent of Benefice—Perquisites or Gains accruing by reason of Office—Grant by Affiliated Branch of Queen Victoria Clergy Sustentation Fund—Income Tax Acts*, 1842 (5 & 6 *Vict. c.* 35), *s.* 146; 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Sched. E.*

The appellant, a beneficed clergyman, received for several years an annual charitable grant of money from one of the diocesan branches affiliated to the Queen Victoria Clergy Sustentation Fund, which is a body incorporated with the object of giving pecuniary assistance to poor clergymen holding benefices. The funds of the diocesan branch were administered by a council under rules which provided that no assistance should be given where the income of the applicant's benefice exceeded 200*l.* a year, or where, though the income of his benefice did not exceed that sum, he was not a poor man, and that the onus should rest upon the applicant of deciding whether his own circumstances justified him in applying for charitable assistance out of the funds. The giving, withholding, continuance, or discontinuance at any time, of grants out of the funds were matters wholly within the discretion of the council:—

Held, that the sums received by the appellant from the diocesan branch were not "perquisites or profits accruing by reason of" his office within the meaning of the first rule, contained in s. 146 of the Income Tax Act, 1842, for charging duties under Sched. E, and therefore that he was not liable to pay income tax in respect of those sums. HERBERT *v.* MCQUADE - - Div. Ct. 761

6. —— *Legacy Duty — Things given to be Enjoyed in Succession — Assignment by Person entitled in Expectancy—Persons having "an Absolute Interest therein," Who are—Legacy Duty Act*, 1796 (36 *Geo.* 3, *c.* 52), *s.* 14.

By s. 14 of 36 Geo. 3, c. 52, no legacy duty shall be paid on articles or things not yielding any income, and given for the benefit of or to be enjoyed by different persons in succession, whilst the same shall be so enjoyed in kind only by persons not having any power of selling or disposing thereof so as to convert the same into money or other property yielding an income; but if the same shall come to any persons "having an absolute interest therein," then legacy duty shall be chargeable and paid thereon by those persons.

By the will of the second Marquis of Ailesbury certain articles and things were directed to be enjoyed as heirlooms by the person or persons for the time being beneficially entitled to the testator's mansion-house under the limitations of existing settlements. At the testator's death the mansion-house stood limited, under those settlements, to the use of the third Marquis for life, with remainder to the use of Viscount Savernake in tail male, with remainders over. Subsequently, by a resettlement made in the lifetime of the third Marquis, the estate tail in expectancy of Viscount Savernake was cut down to a life interest, with limitations over; and the heirlooms were assigned to trustees upon trust to allow them to go, devolve, and remain as heirlooms, together with the mansion-house, according to the limitations of the resettlement. Viscount Savernake died, having survived the third Marquis:—

Held, that the trustees of the resettlement were persons "having an absolute interest" in the articles and things within the meaning of s. 14, and were, therefore, liable to pay legacy duty in respect of them. ATTORNEY-GENERAL *v.* BRUCE - - - - Div. Ct. 391

7. —— *Stamp Duty — Property Purchased under Statutory Power — Production of Instrument of Conveyance—Duty on Transfer of Personal Property—Finance Act*, 1895 (58 & 59 *Vict. c.* 16), *s.* 12.

Sect. 12 of the Finance Act, 1895, provides that, where by virtue of any Act any person is authorized to purchase property, he shall, within a specified time, produce to the Commissioners of Inland Revenue an instrument of conveyance of the property duly stamped with the ad valorem duty payable upon a conveyance on sale of the property:—

Held, that s. 12 applied to personal as well as real property; so that, where goods and chattels were included in property purchased under statu-

REVENUE—*continued.*
tory authority, an instrument of conveyance must be produced stamped with the ad valorem duty in respect of the whole of the property so purchased. ATTORNEY-GENERAL *v.* EASTBOURNE CORPORATION - - - Div. Ct. 773

8. —— *Stamps—Conveyance on Sale—Family Arrangement.*
By two deeds made between B. and H. (who was the heir to B.'s settled estates), after reciting that H. had undertaken the payment of the mortgages on the estates, and that B. was indebted to H. in certain sums, it was witnessed that in pursuance of a family arrangement B. conveyed to H. his unsettled estates subject to the mortgages, and also certain specified chattels; but power was reserved to B. and H. to cancel, alter, or make void the family arrangement at any time:—
Held, that the deeds were conveyances on sale, and were chargeable with ad valorem stamp duty. MARQUESS OF BRISTOL *v.* INLAND REVENUE COMMISSIONERS - - - Div. Ct. 336

9. —— *Stamps — Settlement — Power of Appointment—Exemption—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *Sched. I.*
By a voluntary settlement a father conveyed to trustees certain securities to be held on certain specified trusts for the benefit of his children. The settlement contained a provision that the trustees might at the request of any of the children revoke the trusts concerning that child's settled share, and resettle that share for the benefit of a certain specified class of persons. Subsequently, at the request of the appellant, who was one of the children, and in contemplation of his marriage, the trustees revoked the trusts of the original settlement concerning his share, and declared that, after certain trusts during his life, the share should be transferred at his death to the trustees of his marriage settlement upon the trusts declared concerning the same in that settlement. By the marriage settlement, which was of even date, the appellant's share was settled on trusts which were within the power of appointment given to the trustees by the original settlement:—
Held, that the marriage settlement was not, within the exemption to the Stamp Act, 1891, an instrument of appointment relating to property in favour of persons described as the objects of a power of appointment, and that it was, therefore, liable in respect of the appellant's trust fund to ad valorem stamp duty. RUSSELL *v.* INLAND REVENUE COMMISSIONERS - - Div. Ct. 342

—— Land tax—Redemption—Interest, Recovery of—Lapse of time - - 7
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—— Stamp—Time policy for more than twelve months—Continuation clause, Validity of - - - - - 567
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—— Order XXXI., r. 19a (3)—*Discovery and Inspection* - - - - 241
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—— Order LXV., r. 12—*Costs* - - 23
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—— —— r. 13 - - - - 460
See PRACTICE. 4.

—— —— r. 27 (29) - - - - 230
See PRACTICE. 5.

SALARY—Justices' clerk—Power to appoint—Payment of salary - - - 257
See LOCAL GOVERNMENT.

SALE—Food and drugs - - - 376
See Cases under ADULTERATION.

—— Stockbroker—Wrongful sale of shares—Measure of damages - - 867
See DAMAGES.

SALE OF GOODS—*Estoppel—Loss to One of Two Innocent Persons through Fraud of a Third Person—Conduct conducing to the Fraud—Power of Disposition of Goods given to Clerk.*
The plaintiffs, who were timber merchants, kept stocks of timber warehoused in the name of their firm with a dock company. For the purposes of their business they instructed the dock company to accept all transfer or delivery orders in respect of the timber signed by a confidential clerk in their employ; and they authorized the clerk to give such orders for the purpose of carrying out sales of timber made to their customers. From time to time during a period of four years the clerk under an assumed name fraudulently sold to the defendants timber belonging to the plaintiffs, carrying out the sales so made by giving to the dock company orders for the transfer of timber into his assumed name, and then in that name giving delivery orders for the timber to the defendants. The defendants bought the timber and paid the clerk for it in good faith, and without suspicion of any fraud. The plaintiffs having sued the defendants to recover the timber so delivered to them or its value:—
Held (by A. L. Smith M.R. and Vaughan Williams L.J., Stirling L.J. dissenting), that the case came within the rule that, where one of two innocent persons must suffer loss through the acts of a third person, he, who has enabled the third person to occasion the loss, must sustain it; that the plaintiffs by their conduct had enabled the clerk to hold himself out to the defendants as entitled to dispose of the timber, and were therefore estopped from disputing his title to do so; and that the action was consequently not maintainable. FARQUHARSON BROTHERS & CO. *v.* KING & CO. - C. A. 697

SALMON FISHERY — Reservoir—Definition of limits by Board of Trade certificate 163
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SCOTTISH LAW — Lunatic debtor — English lunacy — Committee — Curator bonis—Locus standi—Bankruptcy proceedings.
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SEA FISHERIES—Oysters—Municipal corporation — Power to acquire lease of foreshore - - - - 870
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SEAMAN—Accommodation for—Lascars 686
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—— Offences—Foreign ship, Persuading seaman to desert from - - - 579
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SECURITY FOR COSTS — Appeal from county court—Workmen's compensation 304
See PRACTICE. 3.

SEDUCTION—*Master and Servant—Evidence of Service — Employment by Defendant — Weekly Leave of Absence—Visits to the Father's Home—Assistance in Household Duties.*

The plaintiff's daughter, who was in the service of the defendant, was permitted to go out once a week for an afternoon and evening. On such occasions she went to her father's house and assisted in household duties. In an action by the plaintiff for the seduction of his daughter by the defendant while she was in the latter's service:—

Held, that there was no evidence of the relation of master and servant between the plaintiff and his daughter to support the action. WHITBOURNE *v.* WILLIAMS - - - C. A. 722

—— Action for seduction—Res judicata—Affiliation proceedings—Judgment of quarter sessions - - - - 107
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SERVANT—Master and.
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SERVICE — Receiving order—Stay of proceedings—"Creditors"—Service of notice of appeal - - - - 354
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SET-OFF—Lien on shares—Set-off against debts due from member—Winding-up - 477
See INDUSTRIAL AND PROVIDENT SOCIETY.

SETTLEMENT—Stamp—Power of appointment—Exemption - - - 342
See REVENUE. 9.

SEWERS—*New House, Effectual Drainage of—Local Government—Drainage—Separate Drains for Sewage and Surface Water — Discretion of Urban Council—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 25.

In deciding what is "necessary for the effectual drainage" of a new house, under s. 25 of the Public Health Act, 1875, an urban council must consider only what is necessary for the particular house in question; they cannot take into consideration what is desirable having regard to the disposal of the sewage of the district generally, and upon that ground require separate drains for sewage and for surface water. MATTHEWS *v.* STRACHAN - - - - Div. Ct. 540

SHARES—Lien on — Set-off against debts due from member—Winding-up - 477
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—— Mortgage of — Stipulation that mortgagee shall be employed as broker by the company—Clog on redemption - 550
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—— Usage of Stock Exchange.
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—— Wrongful sale of—Stockbroker—Measure of damages - - - - 867
See DAMAGES.

SHIPPING — *Charterparty — Bill of Lading — Incorporation of Conditions of Charterparty in Bill of Lading—Freight made payable as per Charterparty—Action for Freight—Right of Master to sue.*

By a charterparty, containing the usual exceptions, freight was made payable on the unloading and right delivery of the cargo, which was to be provided by the charterers; the master was to sign bills of lading at the port of loading, and upon the completion of the loading the charterers' liability under the charterparty was to cease. The charterers having placed the cargo on board at the port of loading, bills of lading were signed by the master, whereby the cargo was made deliverable to the shippers or their assigns at the port of discharge, "they paying freight for the same as per charterparty." In an action by the master against the charterers for freight:—

Held, that the master, in signing the bills of lading, had done so merely as agent for the shipowner, and was therefore not entitled to maintain the action. REPETTO *v.* MILLAR'S KARRI AND JARRAH FORESTS, LIMITED - Bigham J. 306

2. —— *General Average—Sacrifice made on Outward Voyage of Ship in Ballast—Liability of Chartered Freight to contribute.*

A ship was chartered to proceed to a foreign port, there load a cargo and bring it home, the chartered freight being payable on delivery of the cargo. Whilst the ship was proceeding in ballast to her port of loading she grounded, and a general average sacrifice was made. She subsequently continued her voyage, loaded her cargo, delivered it, and received the freight:—

Held, that the chartered freight was liable to contribute to the general average sacrifice.

Williams v. *London Assurance Co.*, (1813)

SHIPPING—*continued.*

1 M. & S. 318; 14 R. R. 441, followed. STEAMSHIP CARISBROOK COMPANY *v.* LONDON AND PROVINCIAL MARINE AND GENERAL INSURANCE COMPANY - - - - **Mathew J. 861**

3. —— *Offences—Foreign Ship, Persuading Seaman to Desert from—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 236, *sub-s.* 1.

By s. 236, sub-s. 1, of the Merchant Shipping Act, 1894, "If a person by any means whatever persuades or attempts to persuade a seaman or apprentice . . . . to desert from his ship" he shall be guilty of an offence:—

Held, that this section applies only to British ships, and does not make it an offence to persuade a seaman to desert from a foreign ship lying in a port in this country. POLL *v.* DAMBE **Div. Ct. 579**

4. —— *Seamen, Accommodation for—Lascars—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 210.

The provisions of s. 210 of the Merchant Shipping Act, 1894, which require that a certain amount of space shall be provided for seamen on board any British ship, apply to Lascars serving on board such ships. PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY *v.* THE KING **Mathew J. 686**

—— Collision between vessels, What is—Policy—Vessel riding at anchor—Collision with anchor - - - - **792**
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—— Contract—Impossibility of performance—Implied condition - - - **126**
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—— Seaman—Alien—Compensation for death—Negligence of British subject—Cause of action arising on high seas - **606**
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SIGNATURE—Agent of company—Signature of party to be charged—"Person"—Corporation - - - - **560**
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SLANDER—Words not actionable per se—Imputation of insolvency against solicitor
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SMOKE—Black smoke—Evidence - **186**
See NUISANCE. 2.

SOLICITOR—*Costs—Taxation—Bill of Costs—Application by Third Party—Arbitration—Costs of Solicitor of Umpire—Order for Payment by Party to Reference—Right to Order for Taxation—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *ss.* 38, 41.

Upon a reference under the Lands Clauses Acts between a company and a landowner relative to the value of land taken compulsorily by the company, the umpire directed that the company should pay the costs of the award, including therein the costs of preparing the award. The company took up the award and paid the amount

SOLICITOR—*continued.*

fixed by the arbitrator for so doing. This amount included a bill of costs of solicitors employed by the umpire to draw up the award. The company applied in the King's Bench Division for an order for taxation of the solicitors' bill of costs under s. 38 of the Solicitors Act, 1843:—

Held, that, the umpire being chargeable with the bill and the company having paid it, the case came within the words of the Act and the bill was taxable, but that the order should be to tax it in the Chancery Division. *In re* COLLYER-BRISTOW & Co. - - **C. A. 839**

—— Costs—Taxation—Infant—Guardian ad litem—Official solicitor - - **460**
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—— Slander—Words not actionable per se—Imputation of insolvency against solicitor
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STAMP—Conveyance on sale—Family arrangement - - - - **336**
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—— Duty on transfer of personal property—Production of instrument of conveyance
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—— Time policy for more than twelve months—Continuation clause, Validity of - **567**
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STAMPING—Fees—Inspector, Duty of, to take fees - - - - **117**
See WEIGHTS AND MEASURES.

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36 Geo. 3, c. 52, s. 14—*Legacy Duty* - **391**
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42 Geo. 3, c. 116, s. 123—*Land Tax Redemption* - - - - - **7**
See LIMITATIONS, STATUTES OF. 1.

58 Geo. 3, c. 69, s. 3—*Vestries* - - **225**
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9 Geo. 4, c. 14, s. 6—*Statute of Frauds Amendment* - - - - **560**
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9 Geo. 4, c. 61, s. 3—*Alehouses* - - **157**
See LICENSING ACTS. 2.

3 & 4 Will. 4, c. 27, s. 1—*Real Property Limitation* - - - - - **7**
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5 & 6 Will. 4, c. 50, s. 67—*Highways* - **101**
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—— —— ss. 106, 108, 111–117 - - **879**
See REVENUE. 4.

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6 & 7 Vict. c. 73, ss. 38, 41—*Solicitors* - **839**
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8 & 9 Vict. c. 18, s. 68—*Lands Clauses* - **84**
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9 & 10 Vict. c. 93—*Fatal Accidents* - 606
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10 & 11 Vict. c. 34, s. 64—*Towns Improvement* 180
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10 & 11 Vict. c. 89, s. 38—*Town Police Clauses* 169
See HACKNEY CARRIAGE.

11 & 12 Vict. c. 43, s. 11—*Summary Jurisdiction* - - - - 26, 278
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15 & 16 Vict. c. 85—*Burial* - - 174
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16 & 17 Vict. c. 119, ss. 1, 7—*Betting* - 470
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27 & 28 Vict. c. 95—*Fatal Accidents* - 606
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30 & 31 Vict. c. 84, s. 31—*Vaccination* - 806
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37 & 38 Vict. c. 15, s. 3—*Betting* - 470
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37 & 38 Vict. c. 57, ss. 1, 8—*Real Property Limitation* - - - - - 7
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38 & 39 Vict. c. 55, ss. 4, 94, 95, 96, 98, 104—*Public Health* - - - 274
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38 & 39 Vict. c. 63, ss. 3, 6—*Sale of Food and Drugs* - - - - - 290
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—— —— s. 6 - - - - - 825
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41 & 42 Vict. c. 31, ss. 4, 8, 11—*Bills of Sale* 589
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41 & 42 Vict. c. 32, s. 11—*Metropolis Management and Building* - - - 250
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41 & 42 Vict. c. 39, ss. 6, 7—*Freshwater Fisheries* - - - - - 163
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44 & 45 Vict. c. 41, s. 14, sub-ss. 1, 2, 6—*Conveyancing and Law of Property* - 16
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45 & 46 Vict. c. 43—*Bills of Sale* - 589
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45 & 46 Vict. c. 50, s. 42, sub-s. 1; s. 61, sub-s. 4; s. 87, sub-s. 1 (*d*); s. 102—*Municipal Corporations* - - 75
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53 & 54 Vict. c. 63, ss. 11, 15—*Companies—Winding-up* - - - - 199
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53 & 54 Vict. c. 64, s. 3—*Directors' Liability* 576
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53 & 54 Vict. c. 70, ss. 29, 32—*Housing of the Working Classes* - - - 265
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53 & 54 Vict. c. 71, s. 13—*Bankruptcy* - 628
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54 & 55 Vict. c. 39, s. 93—*Stamps* - 567
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54 & 55 Vict. c. 76, ss. 2, 4, 5, 10, 11—*Public Health—London* - - - 151
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54 & 55 Vict. c. 76, s. 24 (*b*) - - 186
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55 Vict. c. 9, s. 1—*Gaming* - - 195
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55 & 56 Vict. c. 13, s. 2, sub-s. 2—*Conveyancing*
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56 & 57 Vict. c. 39, s. 23, sub-s. 2—*Industrial and Provident Societies* - - 477
See INDUSTRIAL AND PROVIDENT SOCIETY.

56 & 57 Vict. c. 63, s. 2—*Married Women's Property* - - - - 487
See HUSBAND AND WIFE.

56 & 57 Vict. c. 73, ss. 7, 62, 67—*Local Government* - - - - - 174
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57 & 58 Vict. c. 30, s. 2, sub-s. 1—*Finance Act*
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57 & 58 Vict. c. 60, s. 210—*Merchant Shipping*
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57 & 58 Vict. c. ccxiii., s. 74, sub-s. 2—*London—Buildings* - - - 660
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58 & 59 Vict. c. 16, s. 12—*Finance* - 773
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59 & 60 Vict. c. 44, s. 1—*Truck* - - 299
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61 & 62 Vict. c. 49, s. 1, sub-s. 3—*Vaccination*
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See MONEY-LENDERS.

STAY OF PROCEEDINGS—Receiving order—"Creditors"—Service of notice of appeal - - - - - 354
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STOCK EXCHANGE—*Broker, Default of—Liquidation—Claim by Jobber—Right of Action against Broker—Contract carried out by Client of Broker—Claim by Jobber against Broker for Difference between Contract and "Hammer" Prices.*

A member of the Stock Exchange who has become a defaulter may, notwithstanding that the liquidation is proceeding, be sued in respect of claims which are being dealt with in the liquidation.

A broker, who has become a defaulter on the Stock Exchange, can be sued for the difference between the contract and "hammer" prices in a transaction which has been carried out and settled by his client with the jobber through another broker, inasmuch as by the practice of the Stock Exchange the jobber has to pay to the official assignee the amount of that difference which he receives from the client. RATCLIFF & DEALTRY *v.* MENDELSSOHN - - Mathew J. 844

2. —— *Broker including Several Orders in One Contract—Principal and Agent—Liability of Principal to Jobber on Default of Broker—Usage of Stock Exchange—Privity of Contract.*

The defendant employed a broker to purchase for him 225 shares on the Stock Exchange, and afterwards directed him to carry them over to the next account. The broker having instructions from other clients to carry over for them shares in the same undertaking, carried over by a single contract in his own name 925 of these shares with the plaintiffs, who were jobbers on the Stock Exchange, and apportioned 225 of the shares so carried over to the defendant; of the total number of shares 125 were carried over on the broker's own account. Before the next settling day the broker was declared a defaulter on the Stock Exchange, and his transaction with the plaintiffs was closed by the official assignee. The defendant, when communicated with, declined to be further bound by the contract, contending that by reason of the broker's failure the transaction was closed for all purposes at the price current on the day of the failure. The plaintiffs thereupon sold the shares for the best price obtainable, and claimed to be entitled to recover from the defendant the difference between the price at which the shares had been carried over and that at which they had been sold:—

Held, that, apart from any usage of the Stock Exchange, the defendant was liable, it having been the intention of all the parties that privity of contract should be created between the plaintiffs and the defendant, and such privity having in the circumstances been created.

There is an established and valid usage on the Stock Exchange under which a broker who is instructed by different clients to buy or carry over for them shares in the same undertaking can make one contract in his own name with a jobber for the total number of shares. It makes no difference that the broker includes in the same contract shares in which he is dealing in his own name. The jobber and each client of the broker become bound to each other to carry out that part of the contract which is applicable to the order of the particular client. SCOTT & HORTON *v.* GODFREY - - - - Bigham J. 726

3. —— *Broker including Several Orders in One Contract—Principal and Agent—Liability of Principal to Jobber—Usage of Stock Exchange—Privity of Contract.*

Decision of Kennedy J., [1900] 2 Q. B. 18, affirmed. BECKHUSON & GIBBS *v.* HAMBLET C. A. 73

4. —— *Closing of Client's Account by Broker—Sale and Repurchase of Shares by Broker—Profit made by Broker on Transaction in Fiduciary Capacity—Usage of Stock Exchange.*

Stockbrokers had on behalf of clients made a contract for the purchase of shares on the Stock Exchange. The clients having failed to provide

STOCK EXCHANGE—*continued.*

the money for the price of the shares, the brokers, for the purpose of closing the clients' account, went into the market, and sold a like amount of shares to a jobber, and, as part of the same transaction, repurchased the shares from him on their own account. By reason of the sale and repurchase being effected by one transaction, the brokers were enabled to repurchase the shares at a lower price than they would have had to pay if they had purchased them in the market in the ordinary way. The brokers in their account with the clients charged them commission on the sale of the shares to the jobber:—

Held, that, the brokers having acted in a fiduciary capacity in the sale of the shares, and having, by reason of that sale and the repurchase being effected as one transaction, obtained a profit for themselves, they were bound to account for that profit to their principals, the clients. ERSKINE, OXENFORD & CO. *v.* SACHS C. A. 504

5. —— *Closing of Client's Account by Broker—Sale and Repurchase of Shares by Broker—Validity of Closing—Usage of Stock Exchange.*

The defendants, who were stockbrokers, by the plaintiff's instructions effected on his behalf contracts on the Stock Exchange for the purchase of shares upon which they incurred liability to a considerable amount. The plaintiff not providing the defendants with funds to meet that liability, the defendants became entitled to close the account, which they did in respect of the various contracts in the following manner. They got a jobber in the market to make a price for the shares, and, the jobber naming a fair market price, a bargain was made by the defendants with the jobber for the sale of the shares to him at the price fixed and for the repurchase of the shares by them from him for the next account. The plaintiff sued the defendants for wrongfully selling the shares in contravention of an alleged agreement by them to keep the account open. The defendants counter-claimed the difference between the amount of the prices at which the shares were sold to the different jobbers as aforesaid and the amount of the prices at which they were purchased for the plaintiff. The jury at the trial found that the defendants had agreed to keep the account open only on condition that the plaintiff would provide them with money to meet the liability incurred, and that the plaintiff had not done so. Thereupon the judge gave judgment for the defendants for the amount claimed by them on their counter-claim. On application to the Court of Appeal for judgment or a new trial, the plaintiff contended that the closing of the account was not valid, on the ground that the sale of the shares was a mere form, and the defendants, acting in a fiduciary capacity, were not entitled to repurchase the shares on closing the account:—

Held, that the defendants were entitled to retain their judgment.

By A. L. Smith M.R. and Romer L.J.: There was nothing on the facts to shew that the transaction by which the account was closed was otherwise than valid.

By Vaughan Williams L.J. and Romer L.J.: Having regard to the manner in which the plaintiff's case had been shaped at the trial, it was not open to him to raise in the Court of Appeal the point that the transaction between the defendants and the jobbers as aforesaid was not a valid mode of closing the account. MACOUN *v.* ERSKINE, OXENFORD & CO. - - - C. A. 493

STOCK EXCHANGE—*continued.*

6. —— *Privity of Contract—Principal and Agent—Default of Broker—Liability of Client to Jobber.*

The defendant employed a broker to purchase for him certain shares on the Stock Exchange, and afterwards directed him to carry over the shares to the next account. The broker, in accordance with the regulations of the Stock Exchange, purchased the shares in his own name from the plaintiffs, who were jobbers on the Stock Exchange, and afterwards carried over with them the same shares. The defendant's name was not disclosed. Before the next settling day the broker was declared a defaulter on the Stock Exchange, and in accordance with the rules of that body his contract with the plaintiffs was closed at a price fixed by the official assignee of the Stock Exchange. The plaintiffs having ascertained that the broker was acting for the defendant in this transaction called upon him to take up the shares. He declined to accept any responsibility for them: and the plaintiffs, on the settling day, tendered the shares to the defendant, and, on his refusing to accept them, sold them for the best price then obtainable. In an action to recover from the defendant the difference between the price at which the shares had been carried over and that at which they had been sold:—

Held, affirming the judgment of Mathew J., that the defendant was liable as principal on the contract made for him by his broker with the plaintiffs, and that the privity of contract between the plaintiffs and the defendant was not affected by the rules of the Stock Exchange as to the compulsory closing of the transactions of a defaulting broker.

There is no established usage under which the client of a broker on the Stock Exchange who has become a defaulter, and whose transactions have been closed at prices fixed by the official assignee, can claim the right to close at the price so fixed a transaction entered into for him by the broker with another member of the Stock Exchange. LEVITT *v.* HAMBLET - C. A. 53

STOCKBROKER — Wrongful sale of shares — Measure of damages - - 867
See DAMAGES.

STREETS—*Name—Name put up by Local Authority—Removal by Owner—Towns Improvement Clauses Act*, 1847 (10 & 11 *Vict. c.* 34), *s.* 64.

A landowner laid out a new street and called it by a certain name, but the local authority shortly afterwards decided that it should be known by a different name and put up that name in the street. The landowner objected and defaced the name so put up, and was convicted under s. 64 of the Towns Improvement Clauses Act, 1847, which provides that the local authority shall cause to be put up in every street "the name by which such street is to be known," and

STREETS—*continued.*
imposes a penalty upon any person who "pulls down or defaces any such name":—
Held, that the landowner had misconceived his remedy, if any, and the conviction was right. COLLINS *v.* HORNSEY URBAN COUNCIL **Div. Ct. 180**

SUMMARY JURISDICTION — Fees of district surveyor — Liability—Period of limitation - - - - - **278**
See LONDON. 1.

—— Rates, Recovery of — Limitation of time—"Complaint" - - - **26**
See RATES. 2.

SURFACE WATER—Separate drains for sewage and—New house—Discretion of urban council - - - - **540**
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SURPLUS ASSETS — Attachment of debts — Garnishee order—"Companies Liquidation Account" - - - **199**
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SURVEYOR—Fees of district surveyor—Liability—Period of limitation - - **278**
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SURVIVOR — Will — Limitation — Heirs "and assigns" of survivor - - **745**
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TAXATION — Costs — Guardian ad litem — Official solicitor - - - **460**
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—— Costs — Witness — Examination before examiner—Depositions not used at trial **230**
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—— Right to order for—Costs of solicitor of umpire—Third party—Arbitration **839**
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TAXES—Public revenue.
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THEATRE — Buildings — Structural defects — Notice to remedy—Compliance - **250**
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THIRD PARTY—Costs of solicitor of umpire—Right to order for taxation—Arbitration
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TIME—Land tax—Redemption—Interest, Recovery of—Lapse of time - - **7**
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—— Policy for more than twelve months—Continuation clause, Validity of—Stamp
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—— Rates, Recovery of—Limitation of time—"Complaint" - - - **26**
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TOTAL LOSS—"Warranted free of all average"—Pledge of freight not conditional—Partial loss - - - - **412**
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TOWN POLICE CLAUSES—Carriage plying or driven for hire—Concealment of number-plate - - - - - **169**
See HACKNEY CARRIAGE.

TOWNS IMPROVEMENT CLAUSES—Street—Name put up by local authority—Removal by owner - - - **180**
See STREETS.

TRAMWAY—*Liability for Damage from Non-repair of Road—Contract with Road Authority—Transfer of Liability — Tramways Act*, 1870 (33 *& 34 Vict. c.* 78), *ss.* 28, 29.
Where a tramway company has entered into a contract with the road authority under s. 29 of the Tramways Act, 1870, whereby that authority has undertaken the repair of the portion of the road which, under s. 28, the tramway company were bound to repair, the liability for injuries occasioned through non-repair of such portion of the road to persons using the same is transferred to the road authority. BARNETT *v.* POPLAR CORPORATION - - - - **Div. Ct. 319**

TRANSFER—Burial board, Transfer of powers of—Expenses—Rates - - **174**
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—— Stamp duty — Transfer of personal property - - - - - **773**
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TRESPASS—Trustee in bankruptcy, Property passing to—Action for trespass and conversion—Claim for personal annoyance
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TRIAL—County court—Practice.
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TRUCK ACT—Contract for deductions in respect of fines - - - - **299**
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TRUSTEE IN BANKRUPTCY — Disclaimer — Lease— Mortgage by sub-demise—Vesting order - - - - **628**
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—— Disclaimer — Lease — "Unprofitable contract"—Contract for sale of lease **518**
See BANKRUPTCY. 1.

—— Property passing to trustee — Action for trespass and conversion — Claim for personal annoyance - - **449**
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UNDERWRITER—Liability.
See Cases under INSURANCE, MARINE.

USAGE—Stock Exchange.
See Cases under STOCK EXCHANGE.

VACCINATION—*Proceedings to obtain Vaccination Order—Condition Precedent—Public Vaccinator — Offer to Vaccinate Child — Vaccination Acts*, 1867 (30 *& 31 Vict. c.* 84), *s.* 31; 1898 (61 *& 62 Vict. c.* 49), *s.* 1, *sub-s.* 3.
Sect. 31 of the Vaccination Act, 1867, enables summary proceedings to be taken against parents who, after notice, neglect to have their children vaccinated. The Vaccination Act, 1898, incorporates the Act of 1867, and provides, by s. 1, sub-s. 3, that, if a child is not vaccinated within four months after its birth, the public vaccinator of the district, after notice, shall visit the home of the child and offer to vaccinate it in the prescribed manner:—
Held, that the compliance by the vaccination

VACCINATION—*continued.*
officer with the provisions of s. 1, sub-s. 3, of the Act of 1898 was not a condition precedent to the right to take proceedings under s. 31 of the Act of 1867. PYM *v.* WILSHER - **Div. Ct. 806**

VESTING ORDER—Lease—Disclaimer by trustee of bankrupt assignee—Mortgage by sub-demise - - - - 628
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VESTRY—Parishioners' churchwarden, Election of—Right of incumbent to vote - 225
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VOTING—Election of mayor—Validity of vote of disqualified person—Right of chairman to vote—Casting vote - 75
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—— Parishioners' churchwarden, Election of—Right of incumbent to vote - 225
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WAGERING — Statutory defence — Notice — Gaming and wagering contract - 195
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WAIVER—Affidavit, Insufficiency of—Application for judgment summons—Jurisdiction—Prohibition - - - 833
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WAR—Capture—Loss before commencement of war—Seizure—Public policy - 419
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WARRANTY — Against "capture, seizure, or detention"—Seizure by enemy's Government of property of its own subject 919
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—— Collateral agreement—Parol warranty that drains are in order - - - 215
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—— Poor-rate—Right to take water from river —Assessment of intake - - 620
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WAY, RIGHT OF—*Obstruction—Local Government—District Council—Public Right of Way—Removal of Obstruction by Private Individual—Action by Landowner—Power of District Council to contribute to Costs of Defence—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 26.

By s. 26, sub-s. 1, of the Local Government Act, 1894, it is the duty of every district council to protect all public rights of way, and to prevent as far as possible the stopping or obstruction of any such right of way; and by sub-s. 3 a district council may, for the purpose of carrying

WAY, RIGHT OF—*continued.*
the section into effect, institute or defend any legal proceedings, and generally take such steps as they deem expedient:—

Held, that a district council might, under the powers conferred by the section, contribute to the costs of the defence of an action brought against a private individual who had removed an obstruction in the assertion of an alleged public right of way. THE KING *v.* NORFOLK COUNTY COUNCIL - - - **Div. Ct. 268**

WEIGHTS AND MEASURES—*Verification and Stamping—Fees—Inspector, Duty of, to take Fees—Weights and Measures Act*, 1889 (52 & 53 *Vict. c.* 21), *s.* 13.

By s. 13 of the Weights and Measures Act, 1889, "an inspector of weights and measures may take in respect of the verification and stamping of weights, measures, and weighing instruments the fees specified in the First Schedule to this Act, and no others":—

Held, that this enactment was obligatory, imposing upon the inspector a duty to take the fees in all cases. THE KING *v.* ROBERTS **Div. Ct. 117**

WHITEWASHING — Workmen's Compensation Act — Construction or repair of building - - - - - 42
See EMPLOYER AND WORKMAN. 2.

WILL—*Limitation—Heirs "and Assigns" of Survivor.*

A testator, who was seised in fee of a farm, devised it to the use of his nephew for the term of ninety-nine years if he should so long live, and from and after the determination of such term and estate to the use (in succession) of the nephew's four sons for a term of ninety-nine years if they should so long live, with an ultimate devise on the death of the survivor upon trust to and for the use of the heirs and assigns of the survivor of the four sons:—

Held, that the word "assigns" could not be construed as giving a power of appointment to the survivor; that the limitation to the heirs and assigns of the survivor must be construed as a limitation to the heirs of the survivor and their assigns, and that upon the death of the survivor his heir-at-law was entitled to recover possession of the property from a purchaser to whom the survivor had conveyed it in his lifetime. MILMAN *v.* LANE - - - - - **C. A. 745**

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WORKMAN.
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—— "Factory," what is - - - 327
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